Working the Dark Side

On the United States Torture Regime after 9/11

Bjering, Jens Christian Borrebye

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INTRODUCTION:

IN THE ARCHIVE OF AMERICAN TORTURE

> While the proverbial road to hell is paved with good intentions, the internal government memos . . . demonstrate that the path to the purgatory that is Guantanamo Bay, or Abu Ghraib, has been paved with decidedly bad intentions.
>
> *The Torture Papers: The Road to Abu Ghraib*

In 2014, an important text became public: the *Committee Study of the CIA's Detention and Interrogation Program.*[1] This text is the result of an investigation by the Senate Oversight Committee on Intelligence to map actions by the Central Intelligence Agency in the first seven or so years after 9/11 – roughly coinciding with George W. Bush´s tenure as President – and comprises the declassified parts of a much larger report which remain classified at the time of the writing of this text.

I write *became* public instead of *came out* or *were published* to stress the unusual precariousness that characterizes the road from its production to it becoming publicly accessible of not only this specific text, but also of many others available texts on the U.S. torture regime. Between the writing of these texts—be they legal memos, personal testimonies, or direct orders—the attempts to control and direct how they are read, their circulation, and the timing of their becoming public, publication has

[1] The declassified parts of the report are accessible at the Federation of American Scientists' website at http://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf

never just been a routine matter of proofing and editing, and many of the texts have changed to such a degree that any ordinary notion of authorship seems to have lost its meaning. The numerous black boxes spread over many of the pages to block out names, dates, and even gender tell their own tale – a tale of all that information that the public, after all, was still not supposed to know.

It would, however, be a mistake to consider the long embryonic life that many of these texts have lived in the secret womb of government as a series of countdowns to a sudden explosion of hitherto unavailable or unacknowledged truths. Much of the information they relate has been public knowledge for years, spread out between journalistic investigation, scholarly studies, a steady drip of declassified government documents, pictures of prisoner abuse, and reports from the ICCR. Attempting to synthesize all these scattered pieces of the puzzle into one coherent picture would be a gargantuan task, but as much as the material is overwhelming due to its size and complexity, only a brief investigation of what has been accessible for years would be enough to reach the same basic conclusion as that reached by the relatively recently published *Committee Study*: the US army and intelligence community ran a systematic torture regime in the first years of the war on terror, and this regime was supported by convoluted legalism, a policy of secrecy both between branches of government and between the government and the public, and an unfounded claim to, and an almost absurd faith in, the efficacy of various techniques of torture in gathering intelligence.

Even people with no special interest in the intricacies of American torture, people who have gone about their daily business without trying to synthesize or conceptualize the bits and pieces available on the internet and in the press into an overall conclusion about the (wrong)doings of their government or any ally of their country, have on several occasions been forced into a confrontation with the torture that presumably kept them safe while keeping them in the dark. The most salient example of such a confrontation was of course the dreadful pictures from Abu-Ghraib prison that surfaced in spring 2004, but also more lateral confrontations have occurred, for instance when Barack Obama publicly "bemoaned the 'dark and painful chapter in our history," when he came into office,[2] thereby acknowledging—and forcing the public to acknowledge through the ever so frayed relation of political representation—that things had been painful (But painful for whom? The victims of torture? The torturers? The American public? These are decisive questions and they are decisively left out of Obama´s phrasing.)

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2. The Washington Post. "New Interrogation Details Emerge as Administration Releases Justice Department Memos." April 17, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/16/AR2009041602768_3.html?sid=ST2009041602877

Because much of the information was already available—if not in the exact same words or detail, then definitely in enough detail to reach the overall conclusions about the existence and the brutality of a veritable U.S. torture program—the most pressing question should not be any more *if* a torture regime was created and *if* this regime was global in its reach and barbaric in its nature. Any insistence on such a line of questioning would only mean engaging in a game of definitions that has been one of the go-to obfuscations of the U.S. government in its attempts to hide what was going on, and while this dissertation does go into questions of what constitutes torture when prompted by the material at hand, it will not be the main problem, and nor should it be.

Instead of focusing on the *if* question of U.S. torture, this dissertation therefore represents an attempt to zoom in on what made the U.S. torture regime unique, what made it run, and what legal, political, and conceptual nodal points came to structure it. Such an attempt surely presents no easy task, first of all because the politico-military-legal machinery about which these questions should be asked is so vast and multi-faceted that any exhaustive answer is practically impossible, and, second, because such an investigation necessarily hinges upon a basic, and highly disputable claim, namely that any one (or two, or three) answer(s) can in fact meaningfully describe what happened.

The dissertation's basic claim is that with the U.S. torture regime a new idea about torture—its legality, its efficacy, and its justification—was created, and that this new idea about torture was the consequence of a new legal-political ontology characterized by the creation of a "dark side"—a term introduced by Vice President Dick Cheney in a TV interview immediately after the terror attacks of 9/11—of total chaos, presumably ushered in by the terrorists on that clear September morning fifteen years ago.

I use the term "ontology" to denote a most basic level of meaning in and about the world. Speaking about ontology is speaking about the way we meet the world in both the humdrum of daily life and in more contemplative moments. Ontology is about what world we see when we see, and about which opportunities for being and acting we see in this world. Studying a specific ontology is, in short, studying what makes a specific world a *meaningful* world, and analyzing the creation of a new ontology, then, is to analyze how a new world—with all its values, its possibilities, and dangers—comes into being. When the dissertation analyzes the U.S. torture regime and the "new legal-political ontology" upon which it was based, it therefore does so by identifying and analyzing how a selection of decisive texts from the first years after 9/11 created a world where torture was not just an option or a suggestion, but a meaningful—maybe *the* only meaningful—thing to turn to.

That a certain legal-political ontology creates a world in which torture seems possible, reasonable, and perhaps even ethically imperative means that a critique of torture has to happen by way of a more general critique of the ontology which has made it so. If we believed that ontology was based on a transcendent entity—as for instance was the case in much medieval philosophy—such a critique would be hard, not to say impossible; we would only be able to approach it analytically and not critically. It is, however, important to learn from the great critiques of ontology of the twentieth century—an oeuvre that arguably includes the whole family album of Continental philosophy and "Theory"—and, in the words of Jacques Derrida, "deconstruct" the assumptions that created and were created by the new legal-political ontology behind the U.S. torture regime. For, as we shall see, this ontology was *made* through and through; made by the legal opinions of the lawyers, the discourse of the politicians, and the "science" of the torturers, and as such it does not foreclose the possibility of critically engaging with it, but, instead, invites such engagement. Yet, that it was "made" does not mean that it was planned specifically or that a grand conspiracy of lawyers, politicians, and torturers got together one day and agreed on the basics of its architecture; rather, its "madeness" can be traced back to a series of specific choices or strategies and, in turn, the new dilemmas and necessary choices these preliminary choices and strategies brought with them.

The dissertation's basic claim, then, is that the U.S. torture regime was built on a new legal-political ontology, and in its investigation of this ontology and the torture it brought with it the dissertation's aim is twofold:

1) to document the legal-political making of a bipolar world with a "dark side" through analyses of a series of legal memos, and to show how this notion of the dark side related to traditional notions of law, truth, subjectivity, executive power and emergency action,

and

2) to demonstrate how this dark side, through a series of interconnected permutations, not only led to torture, but had torture as its inevitable outcome.

The notion of the dark side refers at its most basic to a realm outside the law. Yet, as will be clear in the first half of the dissertation, what this "outside the law" of the dark side really meant was not given from the outset, but was instead something which first had to be defined and created. The first half of

the dissertation, *dark side*, follows the creation of the dark side as a specific version of the outside of the law which was not only characterized by being outside "legal" laws, but also beyond the laws of language and the laws of truth – a dark (out)side as a space of pure negativity, existing beyond any law *whatsoever*.

The pure negativity of the dark side initially represented a zone of radical and paranoid indeterminancy beyond the law, but this quickly changed with the advent of techniques to transform the dark side into a productive space. These techniques and the transformation of the dark side into a space of production are taken up in the second half of the dissertation, *dark arts*. This half demonstrates how, from the notion of the dark side, immediately followed a series of changes to the basic structure of intelligence work, to the job description of soldiers, and even to the nature of human subjectivity, changes which ultimately ended up creating and being characteristic of the U.S. torture regime specifically and issues of national security at large.

The overall aim of the two-part structure and the dissertation at large is not to argue that a grand conspiracy or hidden desire to torture suddenly found a chance to materialize itself after the terror attacks of 9/11; rather, the aim of the dissertation is to follow the creation of the dark side from idea to reality and to understand why this idea and its real manifestation ended up leading to a surprising return to a systematic regime of torture which most of us thought belonged to a different era. By following these steps, the dissertation hopes to show that the U.S. torture regime was unique in both its build-up and its functioning and to introduce a new conceptual and explanatory framework with which to approach it analytically and critically.

Imagined Constitutions

In his 2007 book *Bad Men,* Clive Stafford Smith describes a debate about torture he had with Alan Dershowtitz, noted Harvard Professor at Law. In the years after 9/11, Dershowitz—who prior to that was considered a "liberal" intellectual—gained notoriety for proposing the formalization of so-called "torture warrants," arguing that officials under exceptionally dire circumstances should be able to acquire a permission from a judge to torture a suspect. At one point during the debate, Dershowitz argues that as soon as you just mention the word torture to people, "all the thinking shifts from the rational side of the brain to the emotional side of the brain" (Smith, 33), and that this automated shift of register is in itself a problem in how it makes it impossible for people to think properly about the dilemmas to which torture sometimes will be the ugly, but necessary solution.

Even though Stafford Smith has very little love lost over the idea about torture warrants, he finds himself agreeing with Dershowitz on one thing: torture is a word that always seems to elicit an "emotive" response. Another way to phrase it is to say that the notion of torture never comes alone, but always drags with it a whole subsystem of ideology, ethics, and affect, and that torture as such therefore inevitably ends up questioning or affirming what we (think we) know about ourselves and about the world.

There exists perhaps no greater testimony to this claim than the genuine surprise many of the victims of the U.S. torture regime felt when they discovered that American agents would in fact torture them, and that brutal abuse was not just the *modus vivendi* of autocratic regimes in the Middle East or Africa.[3] The anticipation of not being tortured by the United States was also exploited by the Americans themselves who often threatened prisoners at early stages of the interrogations with handing them over to the Jordanians or the Israelis (Smith, 54). This tactic, of course, only worked before the Americans started torturing themselves, at which point the cat was out of the bag and the United States could get in line with all the other torturing regimes of the world. The bottom line here is that torture does indeed interweave with our greater narratives about the world, and that it perhaps does so in more profound and inextricable ways than most concepts, due to the abject nature of torture as an isolated act.

Interweaving, however, does not just happen spontaneously; it happens through the mediation of cultural narratives, pundits, politicians, and, most of all, the press. In her article on how the facts of the case of the Pakistani terrorist Abdual Hakim Murad were appropriated and changed by various media reports in the mid-nineties, Stephanie Athey gives a brilliant exposition exactly of how torture comes to be embedded in the tales we tell each other not just about torture, but about terrorism, politics, and, ultimately, ourselves. In her article, Athey traces how the actual facts of Murad's case were distorted almost immediately by the media and the press, only to eventually end up as part of the above mentioned Alan Dershowitz' post-9/11 defense of state-sanctioned torture. The roughly correct part of the widely circulated story on Murad was that he in 1995 had planned an elaborate terrorist attack on several trans-Pacific flights (how many flights has never been precisely established), involving explosive devices that were to be planted under a seat of each airplane and timed to go off at the exact same moment, thereby bringing all the planes down in one fell swoop.

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3. As Mohamedou Ould Slahi tells in his diary, the only solace he found after having been turned over to the Jordanian Special Forces was that they "obviously would still comply with the U.S.," i.e. not torture him (Slahi, 134). Sadly, Slahi would later come to discover that complying with the U.S. in no way meant the impossibility of torture.

The part of the story that was *not* correct, however, was the part that recounted how only "tactical interrogation" (i.e. torture) performed by Philippine authorities prevented his plans from ever being realized. In this other, false part of the narrative, a significant part of the tale—as for instance recounted by Jay Winik in a piece in *Wall Street Journal*—centered on how the Philippine authorities' willingness to go farther than what their US counterparts had saved countless lives, and Winik writes with appropriate rhetoric panache "One wonders of course, what would have happened if Murad had been in American custody." (Hilde et al., 92) The lesson which we presumably are to learn from Winik's "wondering," which really reads more as suggestion or even an imperative, is, of course, that "US squeamishness about torture would have sacrificed information and lives," as Athey writes, if things had turned out so unfortunately that the US and not the Philippines had got their hands on Murad first.

This fascinating tale of how a false story about the efficacy and necessity of torture becomes more and more central to media stories about terrorism in its circulation through various media reports is part of torture's immediate, almost neurotic inscription into larger narratives about the world. Athey describes the logic behind this process the following way:

> The speculation [about Murad] imagines and defines "torture" surely, but also the community that will authorize it and benefit from it or end it. What is true of writing on Murad, then, is true of the larger "debate." In elaborating a concept of the "terrorist we torture," what is at stake in that debate is the imaginative constitution of three deeply interdependent notions: the terrorist, torture, and ourselves" (Hilde et al., 88).

What Athey's description of the case of Murad shows convincingly is the intimate connection between torture and other aspects of what she calls the "imagined constitution" of ourselves and the terrorist other, and of the misunderstandings and misguided support for torture such "imagined constitutions" can end up producing.

Another way to look at the question of torture's inherent link to greater narratives about ourselves and the societies we live in is to study the conditions under which torture comes into being. Instead of starting with torture and then inserting it into a system (of state, of affect, of ideology) *ex post facto* this approach reads torture as something that springs organically from specific legal-political ontologies, from specific *worlds*, as their more or less intended, but always tragic by-product.

This dissertation is an attempt at doing exactly that: at following how a world came into being and at analyzing how the peculiar qualities of this world led to torture. And in the case of the U.S. torture regime we can, as will be clear, trace the steps in this process down to almost specific dates – dates where certain words were written and days were certain choices were made, all of which contributed decisively to the construction of a specific world where state-sanctioned torture became the order of the day.

The Archive of American Torture

In its way through the investigation outlined above, the dissertation engages with and analyzes a plethora of material, most of it in the form of declassified or leaked documents and testimonies. Some of the material is over a decade old, and some of it is less than a year old; some of it is well-known, some of it is not as well known, the latter forming a part of the great store of available material that is only of interest for those of us who for one reason or another have decided to occupy ourselves more than the general public with the workings of the U.S. torture regime.

Taken together, this landscape of available material is nothing less than an *archive*—and an archive of American torture at that—and having an archive is most definitely not a simple matter. As French philosopher Jacques Derrida has pointed out on several occasions, an archive is not just a mere gathering of material in which we can seek answers to questions about the past; instead, the archive is a concept that covers the "general machinery of a culture, with all its techniques for handling, recording, and storing information" (Derrida 1984, 20). Even if Derrida with this line gives us what appears to be a quite thorough definition of what an archive is, throughout his work he never seizes to insist that an archive is and will remain an open question; an open question as to the status of the material or virtual collection of entries that make up the archive, as to access, as to where the archive begins and ends, and as to how and according to which principles one actually goes about reading the archive.

Derrida therefore writes in a remarkable footnote in the beginning of his 1994 book on the archive *Archive Fever – A Freudian Impression* that the "question of a politics of the archive . . . will never be determined as one political question among others. It runs through the whole of the field and in truth determines politics from top to bottom as *res publica"* (Derrida 1995, 4). And as should already be obvious with the archive at hand—the archive of American torture—questions of access, of the nature of the material, and of the political import of the archive of American torture can there not be reduced to technicalities or to clearly defined relations between means and ends; all questions

inherently weigh upon the nature of information and interpretation itself, and the nature of the relation between informational practices and larger social, political, and ethical practices.

Moreover, with Derrida's problematization of the archive in mind it quickly becomes clear that any appearance of seeming wholeness, of completeness, or of narrative self-containment—not to mention "closure"—on the part of any one document or any one bulk of documents in the archive of American torture is illusory. On the contrary, in fact; even the most central of the texts cannot stand alone, but should instead be seen as more or less important landmarks in a much larger and much more sprawled landscape of material that can be traversed in more or less productive and critical ways.

This landscape is not just a sprawl in space, but also in time, and the *Committee Study* and many other newer texts therefore compel us to ask important questions regarding the nature of information as such, and especially information which is part of an archive that is still vastly incomplete due to U.S. classification policies. For every new document we read, an older document becomes re-actualized or even reanimated; the light shed on its actors and its discourse changes ever so slightly, and we become more knowledgeable about the U.S. torture regime. But we also become more aware of the fact that we still do not know it all, and that the light may shift yet again.

Thus, while some of the texts that only recently have become public each in their own way seem to mark a sort of completion of a process, of a narrative, and maybe even of an epoch, this is hardly so. They partake in an ever changing network with all the other texts, films, pictures, and statements on the subject of American torture that have been released since the terror attacks in 2001; a vertiginous amount of material scattered across multiple media, platforms, and genres. Every new text is therefore inevitably inscribed in a different and much larger economy in which sameness and difference are negotiated and exchanged, and in which truth in any shape or form is not related to a sense of closure or conclusion, but to an ongoing process of assembly and re-assembly that will change how we read and relate to them.

Moreover, when we are concerning ourself with the archive of American torture we are immediately tempted to add *during the War on Terror* to the name of this archive, both for the sake of clarity, but also to indicate the presumably exceptional circumstances and events this archive documents. There exists, however, a large bulk of primary texts written and released well before 9/11 that deal with similar topics in an American context, documents that we therefore cannot ignore. Among these are texts from the fifties about CIA-led experiments into torture techniques (e.g. the use of psychotropic drugs, of sensory deprivation, and the viability of "brainwashing",) whose retro-look

may seem quaint and almost charming in their Cold War nostalgia, but whose content at closer inspection are eerily close to the torture techniques used at Guantanamo and various black sites.

Furthermore, and as we know from the German legal scholar Carl Schmitt´s famous dictum "Sovereign is he who decides on the exception" (Schmitt 2005, 6), denoting something as exceptional or out of the ordinary is in itself an exceptionally politically and hegemonically loaded act. A counter-claim to non-exceptionality and the following extension of the archive to include material that suggests a more general trend in the US apparatus would thus—as we shall see in far greater detail later on—in itself be a way to critically approach the post-9/11 regime. I therefore find it apparent that closing off the archive to texts and events that predate 9/11 would be a grave mistake. In fact, the archive of American torture could undoubtedly be extended all the way back to making of the United States, to slavery, to police brutally in the twenties, and to all the wars fought by the US during the Cold War, some by proxy, some with American boots on the ground.[4] Such documenting would be a fascinating and heroic feat, but well beyond the scope of this dissertation.

Moreover, I believe it is impossible to understand the specificities of the U.S. torture regime without having some grasp on the historical modes of and motivations for torture. To make matters matter it is not enough just to relegate seven years of systematic torture to the historical trash heap of analogy, where all things, when seen from a proper distance, look the same. In order, again, to zoom in on this of torture and gain a firm critical foothold, we need to understand how it stands out from other instances of torture, instances that global history sadly overflows with.

So, to sum up: the analysis to follow will be based on very broad (both with regards to the *when* and to the *what*) conception of what constitutes the archive of American torture, and the material thus included will be assembled in ways that hopefully illuminate the main object of the investigation, the U.S. post-9/11 torture regime.

Archival Approaches

The dissertation started as an investigation into a specific part of the torture archive, namely that of popular cultural narratives on torture which with more or less (often less) finesse try to grapple with the sadly relevant topic of torture. The last decade and a half has seen a rise in the number of movies and

4. Further, it should in all fairness indeed be mentioned that the US is in no way unique in having long story of torture; as a matter of fact, in the years from the publication of the *Wickersham Report* (1931) and its section on *Lawlessness in Law Enforcement* to the Korean War the US even seems to have had a more humane attitude towards torture than that of many of its allies.

TV shows that deal with terrorism and torture – *24*, *Alias*, *Rendition*, *Homeland*, and *Zero Dark Thirty* to name but a few – a rise so dramatic that the American NGO Human Rights First started counting and concluded that from 2000 to 2001 the amount of prime time torture scenes grew from 6 to a 110. Moreover, these fictional representations of torture were often not mere reactions to what was already happening in Guantanamo and in secret CIA prisons all over the world. Instead, the circulation of popular cultural depictions of torture in movie theaters and on TV screens quickly became doubled by the circulation of these very same representations in actual political debates where they interacted in surprising and often disturbing ways with arguments both for and against torture.[5]

However, the more I focused on the relation between popular culture and the "real" world of torture, the more I became aware that this relation should not be the main object of my investigation but rather its *starting point*, since the hybrids between fiction and real-life debates were so conspicuous and ubiquitous that focusing on the traffic between them seemed all but superfluous. Instead, while focusing mostly on actual legal memos and other "real" sources from the U.S. torture regime, the dissertation only engages with more classic cultural artifacts when it is needed to illuminate or develop a point, or when the insights of cultural artifacts are decisive to the understanding of certain themes or problems in the analyses of the new legal-political ontology behind the U.S. torture regime.

Yet, I would argue that the dissertation—even if it ended up being mostly about "real" texts and real torture—still largely remains within the framework of cultural analysis in how it addresses the imminently textual creation and nature of a new bipolar world with a "light side" and a "dark side," and studies which modes of action and intervention this world produced and deemed appropriate.

Following such "worldmaking," to use Nelson Goodman's term, can be done through the study of legal memos, but it cannot be boiled down to a merely legal analysis, nor to a politicological one, since, again in the words of Goodman, "worlds are made not by what is said literally but also by what is said metaphorically, and not only by what is said either literally or metaphorically but also by what is exemplified and expressed" (Goodman, 18). Literality, metaphors, expressions; navigating between

5. The popular cultural artifact most commonly referred is the Fox Television show *24* (2001-2010) in which each season recounts exactly 24 hours in the life of counter-terrorist agent Jack Bauer (Kiefer Sutherland). In his 2006 book *War by Other Means*, former Assistant Deputy Attorney General John Yoo—the same John Yoo that wrote many of the legal defenses of the American torture program in the early days after 9/11—thus wrote: "What if, as the popular Fox television program *24* recently portrayed, a high-level terrorist leader is caught who knows the location of a nuclear weapon in an American city?" And the popularity of *24* among pro-torture hawks—a popularity that almost borders on fandom—is not exclusive to John Yoo; in a 2007 primary debate, Tom Tancredo, Republican from Colorado, thus said "We´re wondering about whether water-boarding would be a—a bad thing to do? I´m looking for Jack Bauer [the rampantly torturing anti-hero of *24*] at that time, let me tell you" (McCoy, 177). The Los Angeles Times called this debate a "Jack Bauer impersonation contest."

these three levels of texts and analyzing them and their possible interconnections very much fall under the purview of cultural studies, and it is in this sense that I consider this dissertation to be a work of cultural analysis.

Still, the dissertation remains something of an experiment by attempting to approach what most people would consider not to be cultural artifacts with the methods and epistemology of cultural analysis. Adding to this, many of the documents I analyze belong to another scholarly field, that of law, and as such I am not only transcending the normal borders of cultural analysis, but also trying my hand at a somewhat unorthodox border-crossing into a different academic territory. In attempting this border-crossing I find, if not safety, then at least comfort in a plethora of statements from leading scholars as to the legal analysis presented in the documents I am analyzing; what these scholars essentially say is that most of the legal opinions that were circulated between the Office of Legal Counsel, the Department of Defense, and the White House, were so bad, so partisan, and so faulty that they hardly constitute legal opinions at all in the traditional sense of the word. This somewhat alleviates the stress of trying to cope with a genre of texts that are not normally within the purview of cultural analysis, and as will hopefully become clear, large parts of the memos most definitely lend themselves to other analyses than a legal one.

Moreover, by wanting to give a general and overarching account of the creation of the dark side and the development of the dark arts proper to it, various other important questions to and aspects of torture have be left out, both in the name of clarity and due to limitations in length. In order to perform its synthesis, then, this dissertation is to some extent a construction in how it connects disparate and specifically selected textual elements and genres—legal documents, testimonies, works of fiction, philosophical concepts—into greater conceptual assemblages. Yet, hopefully it is a construction which affords the reader new insights into a torture regime which, for all the shares of fiction it retained itself, was painfully real for many men and women.

A final question looms over the texts which this dissertation attempts to analyze – the question of all that was removed or redacted before the texts came to us, the question of the people who play the lead roles in the texts, but in different ways and for different reasons only remain ephemeral movements behind a thick curtain of silence, and the question of those thousands of pages and hours of footage that have not been released yet or have "disappeared." For instance, we do not yet have access to the full version of the *Committee Study* which is more than ten times the size of what has been published, and this lack applies equally to other texts. Mohamedou Ould Slahi, the writer of the also

recently published *Guantanamo Diary*, is neither accessible to answer our questions due to the fact that he is still a detainee in Guantanamo.

Even today, ten years later, Slahi is therefore not able to tell us what he thinks both about his manuscript as it was written and about his manuscript as it looks after it has been censored by the same government that keeps him locked up. Neither is he here to tell us whether he still holds the views that he expressed close to a decade ago – some of them remarkably stoic considering his situation. "There will be no author tour for this book," as Mark Danner, whose work on the US torture regime is as impressive as it is persistent, wrote in his New York Times review of the book.[6] All of these hidden elements prevent any of the texts from closing in on themselves and imploding in any satisfaction of historicist closure; instead, each text is haunted by its own ghost(s) who lives in the shadow and who, because of its very non-presence in the moment of reading, points us towards a future present where everything or just a little more will in fact be revealed.

These questions of secrecy run through the whole field of the post-9/11 torture regime, it is in a very real sense the matrix of the whole operation, as it modulates between friends and enemies, and between bodies, people, institutions, and square-shaped black blot-outs in documents. It is there as a suspicion that any given prisoner taken from the ranks of the presumed enemy does not tell the whole truth, that he has more "information" to divulge than what is being let on; then as the uncertainty met by a detainee who suddenly finds himself in the hands of foreign intelligence operatives after undergoing "extraordinary rendition" without knowing what will happen, with what right he is being kept, and when, if ever, he will be released; then as an attempt to gauge what "severe pain or suffering" means legally, whether pain is caused "maliciously and sadistically" or "in a good faith" (Greenberg et al., 231-232), and, finally, as the gradual degradation of institutional transparency, both within government and between the government and the public.

Secrecy in these instances is not only the fact of not knowing or not being able to retrieve something from the murky waters of the past; it is in no way comparable to something that has been lost in the fire of history, e.g. to a painting by a great master whose existence we can trace until the year it vanished and whose loss we can lament. On the contrary, secrecy is the driving force behind torture, and especially behind "democratic torture," as pointed out by torture scholar Darius Rejali (Rejali, 4). Moreover, secrecy is not just something that exists in the relation between government and the people. The policy of secrecy surrounding the American torture regime is also a policy of always suspecting

6. The New York Review of Books. "'Guantánamo Diary,' by Mohamedou Ould Slahi." January 20, 2015. http://www.nytimes.com/2015/02/15/books/review/guantanamo-diary-by-mohamedou-ould-slahi.html

people of keeping secrets, and the consequence of this "hermeneutics of suspicion," as French philosopher Paul Ricoeur once called it, can be that one turns to torture as a way to remove or overcome the perilous indeterminancy of intersubjective communication.

All the documents, then, tell a story about of secrecy and about the dangers of secrecy while they themselves are the products of secrecy. They are statements about how secrecy makes possible and maybe even necessarily entails the uncontrollable metastasis of torture; about the way the secrecy of these practices and the pressure of practicing secrecy seem to spawn still more obscure and unavoidable *doppelgängers,* taking, among other shapes, that of an insistent paranoid belief that the detainees at Guantanamo or at various black sites do in fact all carry huge secrets that need to be pried out through punches, waterboarding, and sleep deprivation, and that torture is not only a way to interrogate, but also a way to stipulate the truth of a detainee´s statement, a sort of bulwark against the fundamental precarity of any inter-subjective epistemology.

These considerations lead to the final point about what is included in the archive to be studied in this dissertation: I will study a selection of texts taken from the archive of texts that are freely available in books and online and not dedicate much time to speculating on the basic condition of absence that characterizes the archive. This does not mean that the condition of absence does not interest me, on the contrary in fact; one could write immensely interesting analyses of the use of redactions in (partly) declassified documents, a use that often happens according to interesting and highly problematic criteria of gender, race, or even grammatical classes. I will, however, stick to Michel Foucault's old manifesto about studying texts in their "positivity"—that is, to study texts that are and as they are—in order to take them seriously in their own textuality. I agree with Foucault that by choosing to approach that which is instead of that which could be, or that which is, but remains hidden, we let the texts define "a field in which formal identities, thematic continuities, translations of concepts, and polemical interchanges may be deployed" (Foucault 2010, 127).

Outside any general comparisons with the great French historian, this dissertation also shares another predicament with his work: it focuses on positively existing and accessible documents, but it only focuses on a very small subset of the greater archive on this topic. While I have attempted to choose the texts that are most relevant to my investigation of the new legal-political ontology of the dark side and the dark arts that followed its creation, thousands of other texts could also have been chosen, and I cannot guarantee that the outcome would not have been different if other selections had been made. My analyses, then, come into the world with more than just the inherent precariousness of hermeneutics; their conclusions may be frustrated or even overturned by other existing documents or

by newly surfaced documents. This, however, is a risk I am willing to take. To say something about a few things is better than saying nothing about everything.

State of Research

On a controversial and disputed topic such as torture, many brilliant (and some questionable) books have naturally already been written; books that expose the U.S. torture regime from a journalistic viewpoint and with an impressive range of sources, both undisclosed and named (Mayer, Hersh, Danner); books on the more legal aspects (Margulies, Goldsmith, Clifford, Sands, Siems;) testimonies and collections of testimonies from people involved with the War on Terror (Hickman, Goldsmith, Clarke, Yoo, Rumsfeld; Mackey, Slahi, McKelvey, Wood;) books on U.S. torture as seen in the greater context of twentieth century torture (Rejali, McCoy;) and anthologies with entries covering a wide range of questions (Levinson, Schultz, Hilde.) Regarding torture as such there is also a remarkable range of books; books that analyze torture in its specific epochal incarnations (Rejali, Peters, Langbein, Foucault, DuBois;) books specifically documenting the specifics of various cases of twentieth century torture (Weschler, Conroy;) books that recount the connections between intelligence work and torture (Marks, Langguth;) and books on the more philosophical and theoretical aspects of torture (Brecher, Wizniewski, Scarry, Butler.)

Taken together, those books make for an impressive resource of scholarship which will go a long way to exhaustively describe the ins and outs of the U.S torture regime in its various particular aspects, be they legal, ethical, historical, technical, or philosophical. When going through the often brilliant scholarship it occurred to me, however, that no books have attempted to close-read the legal memos and primary sources from the U.S torture regime as texts that construct a new legal-political ontology; as texts, that is, that are not just flawed, faulty, partisan or plain evil, but also are *productive* in their own sense and as texts that produce a specific world where peculiar notions of power, knowledge, and science exist and reign supreme.

Such attempts at relating torture to specific legal-political ontologies have, however, been carried out with regards to other periods, and among the prominent works that follow this approach should be mentioned Page DuBois's *Torture and Truth* (1991) and Michel Foucault's *Discipline and Punish* (1975) – two books whose method and astuteness this dissertation is highly inspired by, even if it differs markedly from them in scope, tone, and method. In the same manner as DuBois and Foucault the dissertation will synthesize a vast range of different types of texts into greater narratives about the

new legal-political ontology of the U.S. torture regime. This also means that the dissertation is not first of all an independent inquiry into torture as an isolated phenomenon, and the reader might be surprised how little time is spend on actual acts of torture (including testimonies of how it feels to be tortured, how it feels to torture, and which torture techniques are used when and where,) or on isolated ethical dilemmas concerning torture. For an introduction to modern, "democratic" torture Darius Rejali's *Torture and Democracy* and Alfred McCoy's *Torture and Impunity* remain, in my opinion, the two books that—for all their obvious disagreements and differences—gives the best insights into the topic, and the dissertation therefore owes a great deal to these works for how they have provided a baseline knowledge of the topic.

Lastly, the war against the torture which sadly and almost from the outset became such a decisive part of the War On Terror has very much been waged by two normally quite different groups, namely journalists and lawyers. Luckily, brave women and men from these two groups—as, for instance, Joseph Margulies, Jane Mayer, Mark Danner, and Clive Stafford Smith—have not only worked hard to expose the U.S. torture regime in all its illegalities and dissimulation. They have also written quite amazing books about it. To these books—and to countless other newspaper articles, online blogs etc.—the dissertation owes a great number of its insights.

Outline & Structure

The dissertation's first part—*dark side*—documents the making and nature of the dark side by analyzing a series of legal memos from the Department of Justice's Office of Legal Counsel and from the White House and concludes by relating its findings to traditional ideas about emergency action, national security, and torture. The chapters specifically go through the following steps:

Chapter one analyzes introduces the concepts of the "dark side" and of "working" the dark side as concepts that were decisive for the set-up of the U.S. torture regime. The chapter argues that the dark side was neither an unequivocal notion nor something which already existed, but, instead, something which had to be actively constructed, and that the specific legal-political nature of this construction is decisive to analyze in order to understand the specifics of the U.S. torture regime. The chapter then goes on to analyze two legal memos from the Department of Justice's Office of Legal Counsel—one memo concerning habeas corpus and one concerning the Geneva Conventions—claiming that they represent two basic *destructions*—one of the notion of *voices* and one of the notion of *law*—and uses the nature of these destructions to outline the first contours of the "dark side."

Chapter two analyzes a third memo—one concerning possible legal restraints on interrogations of prisoners in the War On Terror—and documents a third destruction, namely the destruction of the notion of *truth*. The chapter documents how the destruction of truth was the outcome of an epistemology of "information," and documents how the shift towards "information" was intimately connected to decisive changes in the workings of the U.S. intelligence community and the relation between intelligence community and the Bush Administration. The chapter concludes by outlining the nature of the dark side as it can be synthesized from the three legal memos.

Chapter three takes a step back and turns towards general conceptions of national security and torture. Most importantly, the chapter analyzes the so-called "ticking time bomb-scenario" and concludes that this scenario is the preeminent "liberal" model of torture; the chapter concludes by comparing the nature and logic of the "ticking time bomb-scenario" with the logic of the dark side constructed by the legal memos, concluding that the legal-political ontology on which the Bush administration built its torture regime differed markedly from the "liberal" scenario of the ticking time bomb.

Chapter four continues the investigation of common conceptions of national security and torture, turning to what the chapter calls a "decisionist" idea about torture – the idea, that is, that the executive in a time of severe crisis—in a so-called "States of Exception"—has the power to suspend all laws in order to thwart grave threats to the nation. Through close readings of the German legal philosopher Carl Schmitt—the "decisionist" philosopher *par excellence*—the chapter concludes that Schmitt's idea about the sovereign and the State of Exception can describe exhaustively neither the Bush administration's policies nor its concept of the dark side. Finally, this last chapter of the dissertation's first part turns to Italian philosopher Paolo Virno and his notion of a "cultural apocalypse," concluding that the Bush administration's idea of a dark side was essentially *apocalyptic*.

The dissertation's second part—*dark arts*—focuses on the transformation of the dark side into a productive space by analyzing official reports, legal memos, and testimonies from soldiers partaking in the War On Terror. The chapters of the second part go through the following steps:

Chapter five revisits the notion of "information." Through an analysis of a trip General Geoffrey Miller's took to Abu Ghraib prison in the late summer of 2003 and recommendations for changes in the interrogation system this visist brought with it, the chapter documents how the procurement of information became a master signifier which came to define all aspects of the War On Terror. The chapter concludes that the concept of "information" from being a notion of immense, amorphous threats was transformed into to a reassuring, organizing principle harboring the promise of total control

over the dark side through the procurement of information. The chapter borrows the term "quantifying axiomatic" from Gilles Deleuze and Felix Guattari's *Anti-Oedipus* to describe this function of information, and presents five decisive aspects of such a quantifying axiomatic, aspects which serve as the conceptual framework for the rest of the dissertation's second part. The chapter claims that the way the the dark side was worked through "dark arts" can only be properly understood if the paradigm of information is understood as such a "quantifying axiomatic."

Chapter six turns to yet another legal memo—one concerning the definition of torture—and documents how the logic of the memo and its conception of human bodies and pain and suffering are completely congenial with the concept of a "quantifying axiomatic" in how it turns both victim and torturer into cogs in a machinery of production – a machinery which produces information, and which can have no other properties than that.

Chapter seven turns to the history of U.S. torture from the fifties and the sixties in order to outline a historical notion of "scientific" torture. Through readings of the *Committee Study,* the chapter turns to the early days of the practical set-up of the post-9/11 torture regime, focusing on how two contractors, James Mitchell and Bruce Jessen, used notions of "scientific" as leverage for introducing a harsh torture regime. Moreover, the chapter shows how the notion of "science" employed by the two contractors can be seen as yet another instantiation of the logic of the "quantifying axiomatic," and that for this reason the U.S. torture regime—while using techniques from the fifties—differs markedly from early, American ideas about torture, its motives, and its function.

Chapter eight analyzes testimonies from soldiers participating in the war on terror, the interrogation log of al Qahtani, and the *Committee Study* in order to document that the lines between fantasy and reality quickly blurred on all levels of the U.S. torture regime; such a blurring is, again, congenial with the logic of the "quantifying axiomatic," and the chapter concludes by analyzing the "enchantment" of the CIA, the army, and individual soldiers by linking it to this logic.

The ninth and final chapter summarizes the findings of the dissertation, arguing that only by understanding the full implications of the construction of the dark side and the subsequent installment of a "quantifying axiomatic" of information as its organizing principle can the U.S. torture regime be properly understood and criticized. More importantly, the final chapter connects the notion of a "quantifying axiomatic" as a national security strategy to newer developments in the area, arguing that the U.S. torture regime should not be seen as a last, anachronistic instance of torture, but as the beginning of a new way of perceiving the relation between information, security, human subjects, and the economy.

dark side

CHAPTER ONE:

DESTRUCTIONS

> This war has been marked by so many lies and evasions that it is not right to have the war end with one last lie.
>
> *Donald Rumsfeld on the Vietnam War*

We all remember Dick Cheney's interview with NBC's Tim Russert on September 16, 2001, if not in its entirety then at least for the vice president's statement that "We also have to work, though, sort of the dark side, if you will."[7] Cheney, who during his earlier tenure as White House Chief of Staff under Reagan had been known to be a quiet, yet efficient official with a knack for getting things done, came out as the poster boy for an American Global War On Terror that would be anything but quiet (or efficient.) More than anything, however, he became the voice of the U.S. torture regime to such an extent that a Google search still gives hundreds of thousands of hits connecting his name to the moniker "The Prince of Darkness."

But what does "work[ing] the dark side" really mean? How are we to understand the metaphor and its implications? Is it in fact even a metaphor? The first thing we notice when wondering about Cheney's statement is that "work[ing] the dark side" is a statement that does not hold one, but two distinct elements; that of the "dark side" and that of "working." These two elements are obviously

7. The entire transcribed interview can be found online in the White House archives at http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html

connected, but they are most definitely not identical – the "dark side" is a place, a zone, a sphere, while "working" is an activity, a process, a means—and without being fully aware of this difference our analysis will be impaired and inaccurate from the outset.

The second thing we notice is that the idea of the dark side harbors a very basic and very strong bipolarity: there can be no dark side without a light side, just as shadows only fall on a day with sunlight. A world with a dark side is necessarily a *bipolar* world.[8] This means that the dark side can only come into being as a sort of twin-project where that which presumably is the light side is drawn up alongside its dark mirror image; at the moment Cheney presents the idea of the dark side, he implicitly also implies the idea of a light side. In short, all aspects of the basic bipolarity have to be constructed in order for it to work and in order for the Bush Administration to "work the dark side."

The final thing we notice is that not only did the Bush Administration intend to let the "gloves come off" after 9/11, as Cofer Black from the CIA quipped in his own post-9/11 interview (Scahill, 339). It also implicitly carries the notion that before 9/11, the United States had not worked the dark side, perhaps because of a refusal to do so, or perhaps because a dark side as such did not exist before 9/11. So not only did the notion of the dark side and of working the dark side bring with it a bipolarity in "space," it also brought with it a temporal bipolarity in which the terror attacks of 9/11 marked a decisive turning point.

These observations are in fact not only observations, but also questions – and not only retrospective questions, but questions which the Bush administration had to solve immediately after 9/11 in order to get to work and to know what they actually intended to work *on*. From the vague ideas of a dark side and of working the dark side, a whole legal-political ontology had to be built in order to transform these ideas from catchy phrases to a functioning (torture) program. The analyses of the first part of this dissertation follows the construction work of the dark side by analyzing the careful interpretative work of the lawyers at the Department of Justice's Office of Legal Counsel – an office which holds twenty-two lawyers and has the extremely important task of being chief adviser to the president "about the legality of presidential actions" (Goldsmith, 9).

The Office of Legal Counsel memos that created and made possible the bipolar world and its dark side were legal memos in name, but hardly so in content; they lacked in "care and sobriety" (Goldsmith, 149), they were the product of an "ideologically extreme and intensely partisan" legal team (Mayer, 45), and years after they were produced they were subjected to a scathing critique of the

8. The concept of bipolarity is inspired by Giorgio Agamben's term *bipolar machine* in his 2011 *The Kingdom and the Glory* (Agamben 2011, 62).

Department of Justice's own Office of Professional Responsibility which noted that they did not represent "thorough, professional, and candid legal evidence."[9] The basic operation of all the memos follows the same overall scheme: they elaborate on certain very basic parts of domestic or international law and then, as the most radical counterpoint imaginable, conclude that these laws do not *apply* to the dark side as the, broadly speaking, zone of intervention for the Global War on Terror.

In doing so, the two sides already mentioned suddenly appear out of the hundreds of pages of legal analysis: a light side and a dark side. The dark side, as it springs from the pages of the legal memos, is a world outside the law. Yet, the fact that something is outside the law is in no way an unequivocal term or concept, but a malleable and extremely ambiguous notion, and as we will see shortly.

The perhaps most common way of thinking about the law's outside is in terms of illegality; inside the law is that which is legal, outside the law is that which is not legal. Even though crimes always do exist in great numbers, this outside of the law does not make uncertain the nature of the law, to the contrary in fact; the law is not only meaningful as a concept when everybody acts legally, and in the classic view of John Austin a law is in fact *only* a law to the extent that it also comes with a threat of what happens if it is broken.[10] The law, then, can be said to find its most basic meaning and strength when it engages with that which is illegal, and as Walter Benjamin writes in his *Critique of Violence* all prohibitions are the outcome of a desire to perform the prohibited act, and as such prohibition and prohibited act are inextricably intertwined[11] (we are here deliberately leaving aside H.L.A. Hart's argument against Austin that much modern law is more about setting the legal conditions for the construction of a specific situation, a contract, an arrangement, a marriage, (what in Austin's argument is generally called a "reward" (Austin, 23)) then it is about proscribing what is legal and what is illegal (Hart, 33-34).)

In classical legal and political philosophy, the law also brings with it another and more literal idea of its outside, an idea which is connected to the *beginning* of the law: there was a "before-the-law"

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9. In the highly incriminating 2009 report it is concluded that "The legal analysis set forth in the Bybee memo was inconsistent with the Professional Standards Applicable to Department of Justice Attorneys . . . we conclude that the memoranda did not represent thorough, objective, and candid legal evidence, but were drafted to provide the client with a legal justification for an interrogation program that included the use of certain EIT's" (226). The full report is accessible at www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf

10. According to Austin, a law is a type of command, and commands are "distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded" (Austin, 21).

11. "For the question 'May I Kill?' meets its irreducible answer in the commandment 'Thou shalt not kill'," as Benjamin writes, thus emphasizing the intimate connection between law and crime (Benjamin 1978, 298).

(a benign natural state or a chaotic and brutal wilderness,) and this before-the-law was, according to the specific analysis, either corrupted or put into order by the advent of the law. The law in this sense is therefore not only that which harbors the basic difference between legal and illegal, but also another and even more original difference, namely that between law and its before. This before literally stands outside the law, not in the sense that it stands for what is illegal, but in the sense that it is outside the law as a "*before*-the-law," before law as such entered the picture and vocalized what was illegal and what was not. In this schema, the before-the-law can serve as symbol of a state of nature characterized either by a dark and violent world or a happy and spontaneously good world. Whether it is one or the other does not really matter for the basic outsideness of a before-the-law to function: the law was not, but is now, and the law's "other" is the before-the-law.

This problem of law's outside in the shape of law's before is probably as old as law (and perhaps even language) itself, and in addition to the many religious mythologies describing the installation of a basic law, it is a problem in the works of thinkers as different as Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Sigmund Freud, Carl Schmitt, and John Rawls (to name but a more or less random few.)[12] Yet, according to German philosopher Christoph Menke, in the 18th century a new notion was added to the thinking of law's outside, a notion which thought of this outside in a different, non-historical way (Menke, 124). The outside of the law is still that zone or sphere where law is not—and where, consequently, the basic distinction between legal and illegal is not—but this outside is no longer historical or mythical. Instead, Menke argues that:

> The other of the law is now the other next to the law [as opposed to before the law], its counterpart, that is to say, it is coeval with the law. 'Considering the law in its difference' means: considering the law in its persistent relation to its other, to that which is not (like) law (ibid.).

What Menke describes here is a topological instead of a genealogical bipolarity: the law goes hand in hand with its twin or its other, namely that which is not law, and it does so not as a matter of sequential

12. The most famous disagreement on this "before" is arguably that between Hobbes and Rousseau, a disagreement which can be summed up by the following quote from Rousseau's *A Discourse on Inequality*: *"*Above all, let us not conclude, with Hobbes, that because man has no idea of goodness, he must be naturally wicked; that he is vicious because he does not know virtue; that he always refuses to do his fellow-creatures services which he does not think they have a right to demand; or that by virtue of the right he truly claims to everything he needs, he foolishly imagines himself the sole proprietor of the whole universe. Hobbes had seen clearly the defects of all the modern definitions of natural right: but the consequences which he deduces from his own show that he understands it in an equally false sense. In reasoning on the principles he lays down, he ought to have said that the state of nature, being that in which the care for our own preservation is the least prejudicial to that of others, was consequently the best calculated to promote peace, and the most suitable for mankind" (Burns (red.), 137).

relation (before the law was, the law was not), but as structural relation (the law is, and its being is related to its other, its outside.)

Menke connects this new idea about the law and its outside to historical changes in the idea of the subject and the rights of the subject where the "The form of subjective rights is the legal form of this difference – of the difference of the individual over against society"(ibid., 126). This means that the concept of rights can never fully cover the contingency and arbitrariness of the individual human being and that rights therefore are predicated on a "structural undecideability" (ibid., 131) that cannot be resolved. We need not go into the Menke's full argument here, but only realize that this new thinking about the law means that a paradox comes to lie at its heart, and that this paradox is based on the relation between the law and its other, i.e. that which categorically cannot be circumscribed by law:

> The model of paradox, by contrast, understands the law as relating *of itself* to its other. Its paradoxical constitution will not dissolve when recognized in an act of critical reflection; the law's constitution rather corresponds to, follows from, its act of self-reflection (ibid., 125).

The paradox, then, is not something that can ever be resolved, but is what Menke calls law's "self-reflection;" we could also follow Jacques Derrida and call it law's *spectrality*,[13] i.e. the fact that law is never done but stands in a perpetual relation to that which it is not. This self-reflection represents a crisis of meaning that becomes constitutive of the idea of law as such; the law *is* this paradox, it is its own difference over against that which it is not and cannot be. Notably, this difference is not something that is established once and for all as a static bipolarity, but something which is constantly negotiated, a negotiation which, to Menke, is what makes law political and what makes possible a politics of law.

What we see, then, is that when the idea of law's other changes from being historical to being structural, a new politics of law centered around the constant negotiation of the relation between law and its other becomes a possibility through the constant "making" and "unmaking" of law's juridical form through law's self-reflection (ibid., 132). With Menke's analysis, we have the outlines of a basic bipolarity at the heart of modern law, a bipolarity which forecloses the possibility of law ever reaching its final, "ideal" form. It is clear that Menke views this foreclosure as not only a descriptive but also normative structural feature of democracy as a form of government which is also always in the process of becoming; the "becoming" of law is a key feature of the "becoming" of democracy.

13. "Spectrality" is a key term in Derrida's work on the relation between archive and law in his books *Specters of Marx* and *Archive Fever*.

Yet, there is one question which Menke's text does not consider, but which we can use his conceptualization to pose clearly: if it is true that the modern concept of law always concerns the reflective relation between the law and its outside, what happens when the structural undecidability between law and its other is not the subject of a constant making and unmaking, but, instead, becomes the foundation of two radically different worlds? What happens when the relation between the law and its other does not proceed by way of reconciliation or negotiation, but by way of incommensurability and strict compartmentalization? What are the consequences of a bipolar world, where what applies for the world of law is structurally kept away from the world outside the law, and where what happens in the world outside the law never enters the world of law?

Cheney's version of an "outside" of the law as a dark side had decisive ramifications for the architecture of the U.S. torture regime and the War On Terror at large, but these ramifications would not have been so severe had he not had the help of the lawyers at the Office of Legal Counsel. These lawyers and the memos they wrote will play the role of main protagonists throughout the dissertation, seeing as they took it upon themselves to be the main architects behind the bipolar world and the torture regime that rose and grew on its dark side.

The memos we will look at in this and the following chapters were written between December 2001 and August 2002. In many instances, even though they were officially not written by the same people, they built on each other, giving the reader the distinct feeling that a legal-political edifice is being constructed through the very destruction of the meaning of law for a certain part of the world, the part we, together with Dick Cheney, have called the dark side. This term will in the beginning be used to tentatively cover both all those peoples and places that came to represent threats to the United States and more abstract notions of the scary world of terrorism, but hopefully we will, during this first half of the dissertation, gradually add content to the concept and thus see a more distinct shape of the dark side take form.

What strikes one immediately when reading over the legal memos is how they enact what we in the above called a strict bipolarity. In each of the memos, we clearly see that they are overloaded with symbolic-ideological gesturing which mostly concerns the basic principles of U.S. law. This overloading reads as refined and congratulatory narratives on the United States and its legal system, e.g. this legal system's "truth-finding function," or the fact that in a trial the prosecution must "shoulder the entire load" in order for the trial to be just. But these narratives are only significant because they outline one side of the bipolarity, and *only* one side; the other side is the side where all these narratives are not meaningful, where they do not apply. These two sides are the light and the dark sides. They are

the two sides to a bipolarity that grows out of the discourse of the legal memos, and together they paint a picture of what happens to law when it is not confronted by its other, but deliberately kept isolated from it.

As we read closer, we notice that the bipolarity is enacted by what we will call a set of basic *destructions* that serve to define the dark side as a strictly negative space. These destructions take different shapes according to the legal issue at hand, but their common denominator is to carve out legally what Cheney had already carved out discursively, namely the idea of a region of the world in which law and all the concepts that condition and determine it—language, order, meaning, logos etc.—do not make sense anymore. The U.S. torture regime was inextricably connected to these destructions, not only because they formed the backbone of the Office of Legal Counsel's analyses and official approval of the torture program, but also because they were the basic building-blocks of a bipolar legal-political ontology whose implications went far beyond that of legal thinking or opinion. What quickly becomes clear is that if you ask a lawyer to construct a line of arguments that tears apart the concept of law, the outcome will necessarily be more than a legal opinion; it will turn what Cristoph Menke called law's "self-reflection" into law's self-*destruction*, and in the ashes of this self-destruction the outline of very different world becomes visible.

Cheney may have been the most powerful vice president in the history of the United States and part of an administration that unilaterally reconfigured the political landscape of the United States and the world through the construction of the dark side, but all of this could not have happened without a group of lawyers who were willing to mold American and United States law and values beyond repair. The dissertation's first part—in which we document and analyze the making of the dark side—will therefore start at the, in this context, inaptly named Department of Justice.

Beginnings

One of the first significant legal memos from the Department of Justice's Office of Legal Counsel was written as early as December 28, 2001, by John Yoo and Patrick Philbin and carried the title "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba." In the memo, Yoo and Philbin engage the question of whether "a federal district court would properly have jurisdiction to entertain a petition for a writ of habeas corpus filed on behalf of an alien detained at the U.S. naval base at Guantanamo Bay, Cuba" (Greenberg et al., 29). The memo, in other words, addresses questions of whether or not the detainees that were soon to be flown to Guantanamo Base in Cuba (the first

detainees would start streaming in in January, 2002) could potentially challenge their incarceration in a U.S. Court, and, just as significantly, whether a writ of habeas corpus stemming from an American Court could and should be heard by the authorities running Guantanamo with the implicit demand that a justification for the incarceration of specific detainee be given.

The question of the extend of the jurisdiction of U.S. Courts would quickly turn into a decisive one, as Joseph Margulies, lawyer and author of *Guantanamo and the Abuse of Presidential Power* (2006), quickly learned when he took upon himself to be a lead attorney in one of the landmark cases against the Bush Administration (*Rasul v. Bush*) in which the lawfulness of the detention of a handful of Guantanamo Detainees was tried. During the trial it became clear that the Bush Administration was not only waging a war against terrorism, but also against some of cornerstones of American law and justice, namely that of habeas corpus,[14] and against any lawyer who turned to the judiciary in the hope of injecting a measure of legality and common sense into a system that quickly had gone from problematic to absurd.

The history of the trial is the history of a constant back-and-forth between lawyers, the judiciary and the Administration with the crux of the matter being whether or not the detainees represented by Joseph Margulies and his team of lawyers could challenge their detention before an American court. Notably, the trials did not revolve around the legality of the detentions as such, but around whether or not any American Court could in fact claim jurisdiction over the American base at Guantanamo Bay at all. If this was the case, a writ of habeas corpus could be extended from the court which, in turn, would force the Administration to justify the detention.

With a detainee population where 95% of those incarcerated were not caught by actual American forces, but by foreign intelligence agencies, the Northern Alliance, or local Afghan warlords (Mayer, 185)—often for a substantial cash reward—[15] the question as to why those persons were to be locked up was indeed more than relevant. Officially, the word was that all of those brought to and detained at the naval base were supervillain-like characters who would "gnaw through hydraulic lines

14. The famous English jurist William Blackstone commented already in the eighteenth century on the importance of habeas corpus: "The glory of the English law consists in clearly defining the times, the causes, and the extent, when wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for this which it is made; that the court upon an habeas corpus may examine into the validity; and according to circumstances of the case may discharge, admit to bail, or remand the prisoner" (as quoted in Perrigo and Whitman, 234).

15. The U.S. offered a bounty of 5,000$ for each "foreign Taliban" – an "enormous sum by local standards, equal to several years' income" (Smith, 47).

in the back of a C-17 to bring it down," as General Richard Myers said,[16] or "the worst of the worst," as Donald Rumsfeld chose to put it (Schultz, 92).

Since the U.S. Army had only caught 5% of the prisoners themselves, we would assume that Myers and Rumsfeld's statements could only have been made after a meticulous vetting process of the detainees, especially considering the indefinite nature of their incarceration. Yet, former U.S. Army interrogator Chris Mackey describes the process of vetting potential Guantanamo detainees as anything but meticulous. Criteria—received from the highest echelons of the army and the Department of Defense—as to who were to be marked as potential Guantanamo transfers were as follows:

(1) all Al Qaeda personnel;
(2) all Taliban leaders;
(3) non-Afghan Taliban/foreign fighters; and any others who may pose a threat to U.S. Interest, may have intelligence value, or may be of interest of U.S. Prosecution (Mackey, 85).

With these criteria as their guidelines—the third category especially—Mackey notes that "Strictly speaking . . . every Arab we encountered was in for a long-term stay and an eventual trip to Cuba." (ibid.) Mackey and his colleagues' on-site evaluation of a given prisoner according to the above criteria functioned as the first sorting mechanism; later, prisoners' cases would be reviewed by a board that "represented four constituencies: army intelligence, the military police, the various civilian intelligence organizations, and the FBI" (ibid.). The existence of such a second sorting mechanism seem a prudent safeguard against any wrongful rendition to Cuba by the stressed out interrogators, but according to Mackey, the review board was mired in conflicting interests between its members that seldom, if ever, benefited the prisoners themselves: "The MP representative was mainly accountable to his crew at the prison. He might want to move out a detainee because the prisoner had diarrhea and was taking too much of the guards' time cleaning him up every day" (ibid., 86).

Notwithstanding how conflicts of interests between army, military police, and intelligence played out in each specific case, when a prisoner's name had been added to the list of transfers to Guantanamo it was "next to impossible to get the name off" (ibid.). This meant that many highly unlikely candidates received their "trip to Cuba." Among those were juveniles, Afghans that had been

16. "Shackled detainees arrive at Guantanamo." January 11, 2002. www.cnn.com. http://edition.cnn.com/2002/WORLD/asiapcf/central/01/11/ret.detainee.transfer/index.html

forcibly conscripted to the Taliban army, and old, toothless men who, try as they might, would never be able to chew through anything, let alone the hydraulic line of a C-17.[17] According to Clive Stafford Smith, a shocking fifty-five percent of the detainees were in fact "not even alleged to have ever taken part in hostilities" (Smith, 159), which is absolutely outrageous but not strange considering Mackey's description of the sorting mechanisms that were in place.

This, then, was the system against which Margulies and his fellow lawyers (among whom counted Clive Stafford Smith who will also follow us through this dissertation) fought, and aimed explicitly at the lawyers of the Office of Legal Counsel, Margulies writes that "[i]f the rule of law is to be silenced during war, lawyers should not be the ones who silence it" (Margulies, 85). This critical gesture is generally applicable to the legal interpretations streaming out from the Office of Legal Counsel in the early years of the War On Terror, but when it comes to the question of jurisdiction and of trying a prisoner's detention before a court through a writ of habeas corpus, Margulies' notion of a "silenced" rule of law has a peculiar pertinence: the word jurisdiction—around which the case he led revolved—is a compound of the Latin noun *ius*, law, and the Latin verb *dicere*, to tell, to say. Jurisdiction is, in short, a term that denotes the area in which the law can speak and, even more importantly, the area in which the voice of the law will be heard. And the particular words that Margulies ultimately wanted the court to say and wanted to force the authorities at Guantanamo to hear were *habeas corpus* – in the Latin vulgate literally: *you have the body*; Margulies wanted the court to say: "You have the body," with the subtext of "explain to me, justify to me, in what right you have this body."

The fact that no detainees should be allowed to try their indefinite detentions at a U.S. Court was the direct consequence of Yoo and Philbins December 28, 2002, memo, in which they specifically engaged in questions of jurisdictions – questions, that is, about whether the voice of an American court could ever be heard across the straits of Florida, and whether anyone could ever be forced to listen. In more general terms, Yoo and Philbin's memo engages with and tries to make possible an "assertion of executive power over something so fundamental to law and justice as habeas corpus," as Jim Whitman writes (Perrigo and Whitman, 216), emphasizing the dramatic consequences of their attempted (and ultimately successful) legal maneuver.

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17. As Jane Mayer writes: "There were mental cases and a few teenagers. One was so demented, he was eating his own feces . . . A Later study undertaken by a team of law students and attorneys at Seton Hall University Law School bolstered the CIA officer's anecdotal impressions. After reviewing 517 of the Guantánamo detainees' cases in depth, they concluded that only 8 percent were alleged to have associated with Al Qaeda. Fifty-five percent were not alleged to have engaged in any hostile act against the United States at all, and the remainder were charged with dubious wrongdoing, including having tried to flee U.S. bombs" (184-85).

Already in the title and the first line of the memo, we are presented with the main thrust of Yoo and Philbin's argument against any judicial intervention: Guantanamo Bay is not situated on U.S. soil, but in Cuba and, as the memo goes on to argue, under Cuban sovereignty. The title is not the only example of how the memo uses apparently inconspicuous wording to make a greater point: Throughout the text, the naval base at Guantanamo is shortened to "GBC" (**G**uantanamo **B**ay **C**uba) which, an acronym entirely invented by Yoo and Philbin for the occasion; when Googling "GBC" the only hits are connected to this exact memo, indicating that even on the level of acronyms it was decisive for the authors to maintain a strong Cuban element in order to displace legal responsibility to the Cubans.[18] If, or so the argument in the memo goes, the naval base ultimately was under Cuban sovereignty then no American court could hold jurisdiction and, accordingly, no writ of habeas corpus could ever be presented to the authorities. Guantanamo Base was *outside* U.S. law in the very specific sense that the voice of a judge could not be heard there.

The Lease

The area at Guantanamo Bay was leased to the United States in 1903 with, according to the original lease agreement, "purposes of coaling and naval stations."[19] The written agreement, signed by Theodore Roosevelt and T. Estrada Palma on February 23 that same year, explicitly goes into questions of sovereignty, jurisdiction, and, most significantly, the relation between the two:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas (ibid.).

18. If you, for instance, read through many of the key documents from the Cuban missile crisis (http://www.archives.gov/research/alic/reference/military/cuban-missile-crisis.html) you will see that this acronym does not appear anywhere; when Guantanamo is mentioned it is most often spelled out. The acronym that later became popularized—GTMO, or GITMO—merely represents a shortening of this, which, as such, does not make it an acronym.

19. Yale Law School. "Agreement Between the United States and Cuba for Lease the Lease of Lands for Coaling and Naval Stations; February 23, 1903." Accessible at: http://avalon.law.yale.edu/20th_century/dip_cuba002.asp

Already in this section it would seem that Yoo and Philbin run up against a problem: the text of the lease explicitly says that while Cuba exercises "ultimate sovereignty," in the area of Guantanamo Bay the United States "shall exercise complete jurisdiction." Moreover, the full jurisdiction of the United States within the leased areas has historically been undisputed, with "federal courts routinely tak[ing] jurisdiction over disputes that arise from the base" and "U.S. law govern[ing] the conduct of all who are present on the base, and crimes committed on the base . . . prosecuted on the mainland in the government's name" (Margulies, 50). This, however, was not how Yoo and Philbin saw it or wanted to see it; for them it was decisive to frame the question of sovereignty as the question upon which everything else depended, making it so that the "ultimate sovereignty" of Cuba—as written in the original lease agreement—would trump any question of jurisdiction.

To argue their case, Yoo and Philbin turned towards a case from 1950, *Johnson v. Eisentrager*, in which German soldiers who had been sentenced to prison by a military commission for having continued to fight after Germany's unconditional surrender were denied habeas corpus by the U.S. Supreme Court. In their quotes from the court's ultimate refusal to grant habeas relief to the petitioners, Yoo and Philbin emphasize the following point:

> No such basis [for a writ of habeas corpus] can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States (Greenberg et al., 30).

Significantly, we here see the same split between sovereignty and jurisdiction as we saw in the lease between Cuba and the U.S., and as such we would therefore expect that *Eisentrager* could be of no help for Yoo and Philbin, but, if anything, actually be detrimental to their argument. The memo writers, however, end up using *Eisentrager* by stating—without any substantiation of why that is—that "[w]e do not believe that the Court intended to establish a two-part test, distinguishing between 'sovereign' territory and territorial 'jurisdiction'" (ibid., 31).

Why the court in *Eisentrager* would split the concepts of sovereignty and jurisdiction up into two separate points, and why the United States and Cuba in their lease agreement not only perform a verbal split, but an *actual* split of the two (Cuba will keep "ultimate sovereignty", the U.S. will hold "complete jurisdiction",) if sovereignty and jurisdiction were one and the same thing is not really answered by Yoo and Philbin. Instead, they just add that "we believe that the Court used the latter term

interchangeably with the former to explain *why* an alien has no right to a writ of habeas corpus when held outside the sovereign territory of the United States" (ibid.).

Of course, an argument to interchangeability is a two-way street which, in principle means that the problem is not solved at all by just conflating the two, since, as we remember, the United States does in fact hold "complete jurisdiction" over Guantanamo Bay. This, however, does not seem to worry Yoo and Philbin, though; their mission—as illustrated in their analysis, their homemade acronym, and the very title of the memo—is to unambiguously tie the base at Guantanamo Bay to Cuba and detach it from the United States. In plain English, their mission is to make Guantanamo Bay and mainland America—90 miles apart as the crow flies—nothing less than a world apart,[20] even though jurisdiction, according to Eve La Haye, can be exercised when "there exists between the state the either the specific offence or the alleged offender a legitimate link" (La Haye, 218).

To further realize just how tendentious Yoo and Philbin's reading of the specific jurisdictional circumstances of the U.S. base at Guantanamo is, two decisive points should be added to the above.

First of all, Yoo and Philbin fail to mention in anything but a footnote that the lease of February 1903 is not the only piece of legal documentation from that year. A second document exists, namely the actual lease contract, signed four months later in early July 1903. In this document—which, again, Yoo and Philbin only mention in a footnote—[21] we find something far more interesting for the question at hand:

> Fugitives from justice charged with crimes or misdemeanors amenable to Cuban Law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities.

[20.] Secondly, Yoo and Philbin omit the pivotal fact that the situation of the German defendants at the time of their petition for a writ of habeas corpus was radically different from that of the detainees at Guantanamo. The Germans' petition took place after they were tried by a lawful military commission, a trial in which they had the right to counsel, and could either hire their own lawyers or rely on attorneys appointed by the commission, who would defend them without charge. Through counsel, the defendants could examine the evidence against them prior to trial, prepare their defense, call defense witnesses, cross-examine prosecution witnesses, introduce evidence in their favor, challenge the admissibility of the government's evidence, and make opening statements and closing arguments" (Margulies, 48). An important testimony to the actual trial-nature of the military commission that sat in judgment over the German soldiers is that six out of a total of twenty-seven defendants (roughly 22%) were in fact acquitted, while the others received highly different prison sentences according to their specific crimes. The Germans, then, had received a fair and open trial in which not only the voices of their captors but also their own voices were heard in the dialogue of a trial; for some this dialogue ended with an acquittal, for others with a five year sentence, and yet for others it ended with a life sentence.

[21.] In this footnote they relate the completely irrelevant fact that the lease agreement contains "a promise from the United States not to permit any commercial enterprise to operate on the base." It seems reasonable to read this as a sort of alibi reference, where they show that they are aware of the document by referencing it, but do not go into its most important sections.

> On the other hand the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities.[22]

These two bullets—which together form article IV of the lease—state in plain English that U.S. law should reign supreme in the area leased by the United States, that Cuban law reigns supreme on the rest of Cuba, and that the two countries are obligated to extradite criminals that have sought refuge in the other part's territory. No clearer explanation as to what the term "U.S. jurisdiction" in fact means should be necessary.

Lastly, but in the scheme of things perhaps most importantly, the question of whether or not Cuba does in fact have "ultimate sovereignty" over the Guantanamo Bay area as stipulated in the original agreement is highly doubtful. While Yoo and Philbin are correct in claiming that the terms of the lease agreement are "definitive on the question of sovereignty," history tells quite another tale: the Cuban Government has repeatedly protested the American presence on the island, and Fidel Castro has presumably refused to cash any of the checks for the rent from the U.S. government.[23] Yoo and Philbin therefore blatantly ignore that if Cuba *did* in fact exercise any "ultimate sovereignty" over Guantanamo Bay, the U.S. would not even have a naval base there to begin with. It therefore seems ludicrous to claim that Cuban sovereignty over Guantanamo Bay would mean that the stated U.S. jurisdiction is nullified.

Disfiguring Destructions

Much more could be said about the specificities of this memo and the case that Joseph Margulies led to contest its conclusions (a contestation he eventually won on behalf of his client, Shafiq Rasul.)[24] What

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22. Yale Law School. "Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda; July 2, 1903." Accessible at http://avalon.law.yale.edu/20th_century/dip_cuba003.asp

23 Reuters. "Castro: Cuba not cashing US Guantanamo rent check." www.reuters.com/article/idUSN17200921.

24. Among those, however, the most interesting fact is that the conclusions of *Eisentrager v. Johnson* had actually already been weakened significantly by a 1973 ruling (*Braden v. 30th Judicial Circuit Court*) which stated that "The jurisdiction of a district court considering a habeas corpus petition requires only that the court issuing the writ have jurisdiction over the custodian of the prisoner." – that is, it does not matter if the prisoner is held outside the jurisdiction of the court, if the authority that holds the prisoner is within the jurisdiction. The full case is accessible at https://supreme.justia.com/cases/federal/us/410/484/case.html

should mostly interest us here, however, is how the basic point of Yoo and Philbin's exercise was to deny the detainees a writ of habeas corpus from a U.S. court – that is, to let the Straits of Florida function like an abyss across which the voice of a detainee challenging his incarceration could not reach, and across which the voice of the court that spoke one of the most basic rights of the American legal system could not be heard.[25] The first characteristic of the dark side started to take shape: it was a zone about which law could not speak, and from which human voices could not be heard.

Yoo and Philbin's realization of the importance of this element is illustrative of a recurring theme in the struggle over the Administration's policies throughout the war on terror: law (ius) is not enough, law also needs to speak (dicere), it needs, in the broadest of its meanings, *juris-diction*. In most cases, the Office of Legal Counsel—precisely tasked with sorting out for any given administration what is legal, and what is not—did not act as the vocal supplement that the law needs to perform, but as the vocal realization of what the hardliners in the Bush Administration had wanted to begin with, ignoring the "hovering *Zeitgeist* called law," as John Yoo—now professor at law at University of California at Berkeley—writes in his memoir (Yoo, 10).

Importantly, however, the memo represents more than just a technical discussion of the relation between sovereignty and jurisdiction. We have seen that a writ of *habeas corpus* is the court saying to the custodian of the prisoner "you have the body," to which the custodian must answer by arguing the reason for the incarceration according to the law. The body in question, the body that the custodian has and the body which the judiciary asks about is here an object of a negotiation: can this body legally be detained? But another voice than that of the judiciary or the custodian is also heard, namely the voice *voice of the prisoner*, which—either by direct hearing or through a representative—is part of the proceedings. Habeas corpus, then, implies and revolves around a basic legal connection between body and voice: *habeo corpus et habeo vox* – I have a body and I have a voice.

Contrarily, Yoo and Philbin's memo was the first step towards a complete destruction of the relation between bodies and voices. The destruction starts with denying the court the right to hear the voice of the prisoner whose body has been locked up, ultimately making the barring of a negotiation of habeas corpus a negation of the body and the voice of the prisoner himself. Then, a radical disconnect between the body and the voice is performed, dislodging the one from the other: the prisoner is here, yes, we have his body, but no one will ever hear his voice. When looking at the first pictures from

25. As Clive Stafford Smith writes about his defense of a Guantanamo Detainee, Binyam Mohamed, "[W]e had to find a way to propel Binyam's case from Cuba over the Caribbean Sea to main USA, where we might find justice in a real court" (Smith, 100).

Guantanamo from early 2002, it is impossible not to try to imagine the sounds at the camp the day the photos were taken: The orange-clad, white-hooded bodies all look the same, the postures of the human shapes are identical, and the only thing that adds a measure of visual dynamics is the barbwire on top of the mesh cages which curls in slightly different ways as it snakes around the top metal beam. Yet, if mesh cages impede bodily movement, they at least seem to carry a promise of aural movement, and we can easily imagine how sound must have traveled with the air through the hundreds of diamond shaped holes that make up the paradoxical raw material of these inescapable cages. But, of course, the glossy surface of the photographs or the computer screen does not give us ears to listen with; the prisoners we stare at remain silent.

If the prisoners themselves remained silent, the officials who sanctioned the regime were overtly vocal. We have already heard General Myers and Donald Rumsfeld assess all the prisoners as nothing short of supervillains, but his was just one voice out of dozens proclaiming what and how they were. Bush himself, in defending the detainee regime, tried to explain to a journalist that "remember that these are the ones in Guantanamo Bay [sic] are killers, they're . . . eh . . . they don't share the same values we share."[26] Bush supplements the last sentence with a back-and-forth hand gesture which implies that the journalist knows exactly what he means, and that he and Bush do in fact "share values," whatever that exactly means, and without specifying exactly which ethical or legal principle justifies detaining those who do not share President Bush's values indefinitely.

In Michael Chion's seminal *The Voice in Cinema* (1984), the French movie scholar introduces the concept of *vococentrism* to denote the fact that in movies as well as in real life the "voice hierarchizes everything around it" (Chion, 6), and that, consequently, the introduction of sound to movies in the late 1920s affected a landslide in the way the movie medium was perceived. Undoubtedly, not only movies but also the legal system is vococentric in the sense that in the legal system the voice of the law "hierachizes everything around it." But the vococentrism of the legal system also harbors a basic voco*pluralism*, in which individual bodies with their individual voices speak their individual cases, and in recent years this vocopluralism has even come to cover the voices of inanimate objects through the increasing importance of the growing field of forensics.[27]

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26. Taken from the 2006 movie "The Road to Guantanamo" (55:17)

27. As one of the most important exponents of what we could call the forensic movement, Eyal Weizman thus writes that "[b]ecause objects do not speak for themselves, there is a need for 'translation' or 'interpretation'—forensic rhetoric requires a person (or a set of technologies) to mediate between the object and the forum; to present the object, interpret it and place it within a larger narrative. This was the role of the rhetoricians and today is the role of the expert witness" (Weizman 2011, 105).

In such a legal economy of voices and bodies, it is not inconsequential which body a voice belongs to: the voice of the judge speaks with one authority, the voice of the accused another, the voice of the forensic expert with yet another, and so on. For this reason, the body-voice dyad is not only a tangential aspect of law, but an essential aspect: The law is, in essence, a cyborg, an assemblage of various animate and inanimate voices that all gather to speak the words of the law. It is vococentric and vocoplural. What the Bush administration set up was a new regime in which the only voices with bodies were those who proclaimed the necessity of the torture system, and a regime in which the detainees could perhaps be seen, but never heard. Whenever we see the bodies of the prisoners, we *only* see them as orange-clad ghosts, but we do not hear them; instead we hear the voices of Richard Myers, President Bush or Donald Rumsfeld describe to us what they are. The vocoplurality of the law, under which the prisoners or at least their representatives would speak and be heard, had lost its meaning on the dark side, and only the authoritative voice-overs of army officials or politicians were there to explain matters to us.

The bodies the public saw on pictures from Guantanamo were silenced bodies, bodies whose voices—their sound, what they said—we can only speculate on. In French, a silent movie is called a *film muet* ("mute movie"), emphasizing what is only partly visible in the English term, namely that the actors cannot speak to the audience. But as Michael Chion also tells us, mute movies are in fact not mute at all, at least not in the sense that the actors themselves do not have the gift of speech. Before the first movies with real sound appeared the audience may not have heard the actors speak, but they may have noticed Buster Keaton's mouth does in fact move, that he is not mute at all. Instead it is the movie that is deaf to Keaton's voice and the words he utters.

In a parallel movement, the new regime that Yoo and Philbin's memo sets up is not a mute regime, but a deaf regime: The court could indeed extend a writ of habeas corpus, but it could not be heard across the Straits of Florida, just as, in the opposite direction, the voices of the detainees could and should not be heard on mainland U.S., but only by their guards and interrogators at the off-land prison. Yoo's and Philbin's memo, then, produces a world where certain bodies have been separated from their voices, and where certain ears can only hear certain things.

That the authorities on Guantanamo were deaf to the legal system does not fully describe the radically new and complex economy of voices that the early outlines of the Administration's War On Terror relied on. For was it not exactly the point of the whole U.S. torture regime to hear the voices of the detainees? Was the point of flying the detainees to Guantanamo not exactly to hear what they had to say about Al Qaeda and Osama bin Laden? Yes; and the base at Guantanamo was just the most visible

and public nodal point in what can only be termed a whole new culture of listening, created alongside the imposed culture of deafness. As we know now, this culture of listening was not only limited to listening to torture victims, but also to what Patrick Radden Keefe in his book on U.S. and U.K. surveillance calls "chatter," i.e. to intelligence gathered not through torture, but through large-scale electronic surveillance (so-called "signals intelligence, or SIGINT.)

The forced deafness of the authorities that held the detainees at Guantanamo to the words of U.S courts therefore went hand in hand with an unprecedented fetishizing of the act of hearing: every word uttered under torture was jotted down, every phone conversation containing certain keywords was monitored and recorded. In the end, then, the Administration or the authorities at Guantanamo were not deaf at all; they just created disfigured voices, detached them from their bodies. Having done so, Administration officials now took the words of these disfigured voices and made them their own. This is Colin Powell speaking:

> Some of the sources are technical, such as intercepted telephone conversations and photos taken by satellites . . . I cannot tell you everything that we know. But what I can share with you, when combined with what all of us have learned over the years, is deeply troubling . . . My colleagues, every statement I make today is backed up by sources, solid sources. These are not assertions. What we're giving you are facts and conclusions based on solid intelligence.
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> . . .
>
> Ladies and gentlemen, these are not assertions. These are facts, corroborated by many sources, some of them sources of the intelligence services of other countries . . . Al-Qaida continues to have a deep interest in acquiring weapons of mass destruction . . . I can trace the story of a senior terrorist operative telling how Iraq provided training in these weapons to al-Qaida. Fortunately, this operative is now detained, and he has told his story. I will relate it to you now as he, himself, described it.[28]

Even though it is formally only Powell speaking, other voices can also be heard in this quote from the Secretary of State's Iraq address to the U.N.: the ghostly, disembodied voices of prisoners who have been interrogated or tortured; the voices of people talking on the phone or chatting on the internet; and the voice of an unnamed "senior terrorist operative" who has apparently told Powell everything he and

[28] The Guardian. "Full text of Colin Powell's speech." February 5, 2003. http://www.theguardian.com/world/2003/feb/05/iraq.usa

his colleagues need to know about Al Qaeda, Iraq, and weapons of mass destruction. These voices talk through Powell from beyond the event horizon of the black legal holes that made up the U.S. detainee regime; they are the detached voices of the detainees, voices without bodies, the ghostly murmur of the dark side.

We know today that the "senior terrorist operative" Powell refers to in his speech was Ibn al-Shaykh al-Libi, al-Libi in short, who the Pakistanis had caught on December 19, 2001 and handed over to the Americans for further interrogation. Al-Libi was one of the most important early catches in the War On Terror: he had been the "chief of Bin Laden's Khalden training camp" and trained "hundreds, possibly thousands, of jihadis in terrorist tactics" (Mayer, 105). The first agency to get their hands on al-Libi were the FBI who treated al-Libi as if he were a suspect in a criminal case, and the sessions between al-Libi and the FBI apparently yielded so much information that the agents in charge of the interview could hardly keep up. But in spite of their efficacy the sessions were not allowed to last long. After a few days, a young CIA-agent who happened to have worked earlier for the FBI-agent in charge of the interviews came barging in, shouting to the highly talkative al-Libi "You' re going to Cairo, you know. Before you get there, I´m going to find your mother and I' m going to fuck her" (Margulies, 119).[29]

The CIA-agent held good on his promise to send al-Libi to Egypt where—after "seventeen hours in a 'small box' and being "punched"—he "came up with a story that three al-Qai'ida members went to Iraq to learn about nuclear weapons" (McCoy, 50). Later, in 2004, al-Libi fully recanted his confession, stating that it was given under torture, but by then it was too late: Colin Powell had already used the coerced and false statement as a key element in bringing the U.S. into its second war of the new millennium. The disembodied voice of al-Libi, torn loose from the state his body was in and the torture he was subjected, was appropriated by Powell to pave the way for the war in Iraq.

Remembering Guernica

Before Powell were to give his above quoted speech at the U.N., American diplomats worked behind the scenes to make the U.N. throw a "blue cover" over a huge replica of Picasso's famous mural

29. There are slightly different versions of this farewell greeting: Jane Mayer renders it as "You're going to Egypt! And while you're there, I' m going to find your mother, and fuck her!" (Mayer, 106); chances are that the words were uttered in Arabic and the differences are differences in translation of the original Arabic.

painting *Guernica* which otherwise would have formed a backdrop to Powell's speech. The diplomats claimed that it would send "too much of a mixed message."[30]

Whatever Powell's—or whoever was behind the covering up of the mural—motivations were for covering it up, when looking at Picasso's masterpiece the wish to cover it up is not surprising: Guernica is a painting of bodies—human and animal, lying down, standing up, falling—and every one of these bodies, without exception, have wide open mouths. We cannot hear the screams that exit these mouths, but part of the genius of the painting is that we do not need to. The hot breath of anger, of fear, or of sheer panic seems to radiate from even gritty online versions of the painting. *Guernica* may be a mural about many things, but it is surely a mural that connects voices with bodies, outlining an economy between the two that exists in the transactionary space between the viewer and the contorted figures on the canvas. A person looking at the painting finds herself thinking about the connection between the bodies and voices *of the* victims of Hitler's Spanish bombing raid, hearing the voices of the victims extend silently yet audibly from their wide open mouths. No wonder Powell wanted this mural covered up; in its monochromatic representation of the horrors of war, it seems to embody the connection between bodies and voices as a basic element, or perhaps as a first element of some sort of justice or the possibility of justice for the victims.

In his critique of the modern surveillance state, Daniel Nemenyi notes a paradoxical tendency proper to the modern national security state: "whilst the state becomes increasingly imperceptible from the outside, it simultaneously demands full transparency and information on the part of all others."[31] This is undoubtedly true—and, perhaps, even truer today than it was in the early years of the war on terror—and with Yoo and Philbin's memo we are dealing with an early rendition of this tendency: the while Bush Administration forcibly made the public deaf to the voices of detainees, it simultaneously demanded to hear and appropriate every word that was said by those same detainees – not as words uttered in a courtroom, but as words the detainees had uttered under torture, as murmur or chatter from the dark side.

We can only speculate on how things had played out, if the Administration had not succeeded so well in setting up this first element of the dark side where voices and bodies could no longer partake

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30. Maureen Dowd. "Powell Without Picasso." February 5, 2003. The New York Times. http://www.nytimes.com/2003/02/05/opinion/powell-without-picasso.html

31. Daniel Nemeyni. "Submarine State." September 2015. www.radicalphilosophy.com. http://www.radicalphilosophy.com/commentary/submarine-state

jointly in legal proceedings. The element enabled the White House and the intelligence community to appropriate the voices of the detainees for their own ends as the disembodied "chatter" on which they based their actions and on which the future set-up and propagation of the torture regime hinged. Both Yoo and Philbin's memo and Powell's speech at the U.N. were ways of destroying the idea of personhood through the elimination and the appropriation of the bodies and voices of the detainees, and this destruction will, as we shall see, become eminently emblematic for the dark side. Eliminating and appropriating, or eliminating *through* appropriating.

The blue cover that was thrown over the Picasso replica was therefore in itself a replica of the first legal cover thrown over Guantanamo by Yoo and Philbin. This cover destroyed one of the basic concepts of the legal system, namely the right to have a judge hear one's case. More importantly, however, it introduced a dark side which was emptied out of any words other than those appropriated by top-level officials as "chatter," thereby contributing to an idea about a radical outside of the law in which nameless and silent threats lurked around every corner. The only words from the dark side that could be heard where those told by the Bush Administration, from where the voice of the prisoner's body comes back as the ghostly voice of authority – not the prisoner's authority but the authority of Powell, Bush, or Rumsfeld.

With the Yoo and Philbin memo, the first destruction was performed successfully: a destruction of *habeas corpus* through a rewiring of who could speak and who could hear. Even more importantly, the first outlines of a dark side of complete anarchy—anarchic precisely because the only voice anyone could hear speak from it was a ghostly voice of disembodied threats and terrors—started materializing.

Customs of War

The Torture Memos do not constitute one single, coherent legal argument for the viability and legality of the U.S. detention and torture regime. Instead, every single memo is yet another brick on a road that would ultimately lead to the abuses at Guantanamo, various CIA black sites, and Abu Ghraib prison. Like the hugely varied palette of torture techniques approved by later memos, these early memos represent a coordinated, multi-pronged attack on several different legal safeguards, with each memo being a suggestion as to how the destruction of a specific corner of the law—be it domestic or international—can be imagined and performed.

The habeas corpus memo analyzed above came about when the acute question of how and where prisoners taken during the invasion of Afghanistan could be detained beyond the reach of

American courts, yet within the easy reach of the increasingly aggressive interrogators. The memo we will look at now was arguably an even more decisive brick on the road to Guantanamo and in the construction of the dark side, since it effectively made the U.S. cancel its adherence to the Geneva Conventions which, since 1949, had regulated the treatment of war wounded, prisoners of war, and civilians.

A little history is needed to appreciate the content and historical significance of the memo: In the latter half of the eighteenth century, several attempts to formulate laws of war and the treatment of prisoners of war were made. Among those attempts, the so-called Lieber Code, approved by President Lincoln as General Order No. 100, was one of the most important, since it marked the first instance of a sovereign state formalizing the legal conduct of its own armed forces (Maguire, 36). The timing of Lincoln's approval of the Lieber Code—it happened in the highly dramatic year of 1863—shields the Code from any accusations of academic naiveté or unrealistic peacetime optimism. If ever there were a time when a president of the United States of America could reasonably claim that the nation faced an "existential threat" this was it. Yet Lincoln personally approved of a document which would limit the actions of the soldiers under his command.

Francis Lieber, the author of the document, was a scholar at Columbia College, but before that he had been a soldier in the Prussian Army and fought in the battle of Waterloo, the Battle of Namur, and the Greek War of Independence. If anyone knew the abyssal difference between talking about war and fighting a war, then, it was Francis Lieber. Probably precisely for this reason, the provisions of the code he ended up lending his name to were not entirely new; instead, they essentially represented a "codification of long-standing Western military customs" (ibid.) – that is, they represented the rules of war as they should look like in the eyes of a soldier. Lieber, therefore, was arguably the first in a long line of soldiers who would assume the role of defending a set of very basic moderations when it came to war – for all his shortcomings, 150 years later Secretary of State Colin Powell, who had served two tours in Vietnam, would thus be one of the Bush Administration's most vocal opponents of abandoning the laws of war.

The reason for our interest in the Lieber Codes is first of all that they illustrate how the U.S. before 9/11 could boast a long and proud tradition of creating and adhering to regulations of warfare and the treatment and fair trial of prisoners of war[32] – a tradition that continued through 1949 when the United States participated actively in formulating the four Geneva Conventions which are still in force today. Secondly, it is significant that the content of the Lieber Code represented "long-standing Western

32. For a quick overview over the U.S. role in the Nuremberg trials, see (Smith, 82-4)

military customs." Theodor Moran argues convincingly that also the Geneva Conventions have the force of "customary international law," a legal term which means that their force are beyond that of formally signed treaties, and that they, for this reason, cannot be suspended or abrogated (Moran, 1987).

That the Geneva Conventions articulate "military custom" is therefore decisive when approaching and evaluating just how radical the Bush Administration's apostasy from decades of adherence to their principles were. Because their force even transcends that of their "universal acceptance . . . as treaties" (Meron, 348) a choice to deviate from them is not possible since "parties [can] not terminate their customary law obligations by withdrawal" (ibid. 349). Breaching or disregarding the conventions is therefore considered, in the words of William Schulz, a "mark of singular dishonor" (Schulz, 91), with torture specifically being an integral part of customary international law, an "international crime governed by universal jurisdiction" (La Haye, 50).

The Geneva Conventions in their present form are made up of four different parts: one regulating the treatment of wounded soldiers, one regulating the treatment of wounded navy personnel, one regulating the treatment of prisoners of war, and the last one regulating the treatment of civilians. A thorough investigation of the Geneva Conventions is beyond the scope of this dissertation, but it may be a point in itself that we do not need to look far in the conventions to find a sort of baseline standard for the treatment of *any* person involved in a war, either as a combatant or as an unlucky civilian caught in the line of fire. We only need to look at the so-called Common Article Three—named so because it appears in all of the four Geneva Conventions from 1949 (Pictet,16)—which (after a longer introductory text) states that:

> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> *a)* violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> *b)* taking of hostages;
>
> *c)* outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (Pictet, 27).

Common Article Three is important because it is considered by scholars of international law to establish the very minimum standards of treatment for any category of personnel in any type of armed conflict; according to the International Court of Justice, common Article Three reflects "elementary considerations of humanity . . . applicable to all armed conflicts" (as quoted in Henckaerts and Beck, L). Whether a civilian, a prisoner of war, or a wounded on the battlefield or at sea, the provisions of Common Article Three are therefore meant to establish a baseline conduct below which no nation should ever go in its treatment of humans participating or caught in a theater of war, expressing the "convention's most basic humanitarian principles" (La Haye, 41). Sadly, with the possible exception of *b* (stress *possible*: U.S. forces incarcerated innocents in Abu Ghraib prison to pressure perceived insurgents for information) the U.S. systematically violated all four of the above provisions. In the eyes of the Administration, though, no systematic violation ever took place, because the very concept of law did not apply to the dark side.

The Twilight of Geneva

In a January 9, 2002 memo from John Yoo to Department of Defense legal adviser William J. Haynes II ("Jim Haynes") titled "Application of Treaties and Laws to Detainees," Yoo opines that "neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners" (Greenberg et al., 79). The conclusions of Yoo's lengthy memo which stretches over 40 pages are readily accepted by the Pentagon, who in a January 19 memo for the Chairman of the Joined Chiefs of Staff signed by Donald Rumsfeld writes that "The United States has determined that Al Qaeda and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status" (ibid., 80).

Yet, despite Donald Rumsfeld's unilateral statement, the United States had not yet "determined" anything to that nature; the conclusions of Yoo's memo still had to go through his boss at the head of

the Office of Legal Counsel, Jay Bybee, then be condensed into recommendations to the President by Bush's counsel Alberto Gonzales, until it finally crystallized into an actual Presidential order on February 7, 2002, under the title of "Humane Treatment of al Qaeda and Taliban Detainees."

On January 22, three days after Rumsfeld jumped the shark, Yoo's memo was rewritten almost verbatim by his superior at the Office of Legal Counsel, Jay Bybee, and sent to Alberto Gonzales, seeing as Yoo's original memo had formally only had Jim Haynes of the Department of Defense as its addressee and not anyone at the White House.

The importance of this detail cannot be understated: formally it was Bybee that gave a legal opinion on the application of treaties and laws to detainees to the White House, and not Yoo. And even though Bybee's version of the legal opinion was highly inspired by Yoo's, its wording did differ slightly in certain key passages. Arguably the most significant deviation is found in each of the two texts' summaries of the legal argument. John Yoo's earlier, January 9 version (which, again, was formally only addressed to the Department of Defense) reads the following way:

> We conclude by addressing a point of considerable significance. To say that the specific provisions of the Geneva and Hague conventions *do not apply* [my emphasis] in the current conflict with the Taliban milita *as a legal requirement* is by no means to say that the principles of the laws of armed conflict cannot be applied *as a matter of U.S. Government Policy* (ibid., 62).

Bybee's January 22 memo, which was the official opinion upon which the White House was to base its policy, reads:

> We conclude this Part by addressing a matter of considerable significance for policymakers. To say that the President *may suspend* [my emphasis] specific provisions of the Geneva Conventions *as a legal requirement* is by no means to say that the principles of the laws of armed conflict cannot be applied *as a matter of U.S. Government Policy* (ibid., 105).

The decisive thing here is the difference between writing that the Geneva Conventions "do not apply" and writing that the "President may suspend" Geneva. When reading the memos, it seems natural to assume that only the latter version would have reached the President and his adviser Alberto Gonzales,

since the former was directed at Jim Haynes at the Department of Defense and not to Gonzales at the White House.

Nevertheless, in Gonzales' final, January 25 letter of recommendation to the President, the recommendations return to Yoo's original wording, stating that the "Department of Justice had issued a formal legal opinion concluding that the Geneva Convention III on the Treatment of Prisoners of War (GPW) does not *apply* [emphasis added] to the conflict with al Qaeda" (Greenberg et al., 118). And in the end, even though the word was—contrary to what Gonzales claims—in fact not used in the official recommendation from Department of Justice to the White House, but only in Yoo's memos to Jim Haynes at the Department of Justice, President Bush chose the term *not apply* over the word *suspend*, noting that "I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva *apply* [emphasis added] to our conflict with al Qaeda" (ibid.,134).[33]

So, a discreet and unexplainable slip from a logic of suspension to a logic of non-application. The question of what the difference between suspension of laws and claim that laws altogether are not applicable means is a tricky one, but it is also an extremely interesting and important one, since the memo-writers at the OLC and Bush's adviser Alberto Gonzales deliberately chose to disregard Bybee's wording and go back to an earlier version. The difference, then, seems, to have been a vital part of the considerations of the memo-writers in the Department of Justice and the President's advisers in the White House.

Looking further at the final document signed by Bush,[34] we can perhaps come closer to why it was so vital to frame it as non-application and not as Presidential suspension. The memo states in its first bullet that the war against terrorism "ushers in a new paradigm . . . Our Nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva" (ibid., 134). The strong emphasis on the agency of the terrorists to usher in a "new paradigm" creates an image of a world in which the agency of the executive does not matter, since, in a sense, the terrorists themselves have decided how the President should proceed. It is, in other words, as if questions of Geneva are no longer political or legal, but something else which directly connects to the memo we analyzed above: the dark

33. The conclusion was met with critique by Secretary of State Colin Powell who delivered a dissenting opinion in which he stated that he was "concerned that the draft does not squarely present to the President the options that are available to him" (Greenberg et al., 122).

34. The *The New Yorker*'s Jane Mayer—who, along with *The New York Review of Book*'s Mark Danner, has been one of the most important and clear-sighted public voices in the debate about the American torture regime—writes about this specific memo that "Of all the complicated legal arguments made by the Bush Administration in the first months after 9/11, none more directly cleared the way for torture than this" (Mayer, 79). It is hard to disagree with Mayer's assessment.

side is dominated by ghostly voices to which no laws apply, not as a choice, nor as an opinion, but as a fact. It follows naturally that in such a world there can be no question of suspension, since suspension always presupposes some future point where what is suspended will once again become valid. With regards to the dark side suspension is off the table; non-application is what it is about, the dark side is not a zone existing momentarily outside the law, but a space which categorically exists outside the law.

Things, however, are not as simple as just claiming that the Geneva Conventions do not apply, for in the third bullet of the same document, after asserting that the conventions do not apply, Bush turns around and asserts that, in a sense, they *do* in fact apply:

> Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva (Greenberg et al., 135).

While it is by no means hard to see how huge a loophole for abuse the caveat regarding "military necessity" is, there is something more ephemeral and less obvious at play in Bush's memo than just an appeal to military necessity. The structure of the memo is as follows: First, it effects a dissolution—and, again, not a suspension—of the relation between the Geneva Conventions and the "new paradigm" or, in Cheney's words, the dark side. Then, almost immediately, it re-sutures this dissolved relation, albeit with two decisive caveats: one, that the Geneva Conventions are now applied as "policy" and not as law, and two, that the re-sutured relation remains contingent on the dictates of military necessity.

In this back-and-forth a very particular and clever interplay between power and powerlessness is hidden, an interplay which manages to simultaneously put forth a tremendous show of Presidential strength *and* a tremendous show of Presidential weakness, as if Bush is both master of reality and slave of reality at one and the same time. Such a double exposure is not merely a matter of semantics, but a way to let a world that presumably has been irrevocably changed by terrorists and their "new paradigm" of the dark side empty out the meaning of law *as law*, only to rephrase the content of this very same, now defunct law in the language of executive power.

It is as if the law is both present and absent at the same time, present as power and as the power to direct, but absent as law as such. In the process of radical destruction and instant re-suturing of the

relation between law and the War On Terror, we are, in a sense, faced with a most basic question of identity and signature: what does it mean that the laws do not apply, but that they nevertheless will be applied by the President (again, to the extent that they do not conflict with military necessity)? What does a law lose when it is no longer a law, but still speaks the exact same words that it did when it was a law?

The Signature of the Law

Facing these hard-to-grasp questions about the cracks in the law's identity with itself we might find some answers in Jorge Luis Borges' short story *Pierre Menard, Author of Don Quixote.* In Borges' story, Menard has rewritten certain chapters of Cervantes' famous epic verbatim, a work for which he receives rave reviews from the narrator of the short story (the story *in toto* is in fact framed as a sort of review,) even if all he has done is to give Cervantes' tale a different signature. The reason that the reviewer indeed does prefer Menard's version to Cervantes' original one—even though they are perfectly identical—is that the dissolution of the relation between the original Quixote and its historical conditions of possibility suddenly make possible a re-suturing of the very same narrative with a different, more relevant, and presumably more interesting modern context.

But in its traffic from Cervantes to Menard something significant happens; it is as if something comes loose, as if the dissolution of the text from its proper signature affects a total breakdown of narrative coherence which means that Menard "multiplied draft upon draft, revised tenaciously and tore up thousands of manuscript pages" (Borges, 55) even if what he wrote was in fact written before and lay ready to be copied before him. It is as if we can recognize the example of Pierre Menard exactly in what President Bush did; going through, if not "thousands", than at least hundreds of pages from his legal advisers on how to escape the trappings of international law, only to almost end where he started by saying that the "principles" of Geneva will be adhered to.

Yet, saying that he almost ended where he started is very far from saying that he did in fact end where he started. The end differed significantly from the beginning in adding that every compliance with Geneva would have to be contingent on military necessity and on the grace of Bush (Margulies, 158). In his *Before the Law,* Jacques Derrida continues Borges' investigation of identity, difference, and the law, asking "what if the law, without being itself transfixed by literature, shared the conditions of its possibility with the literary object?" (Derrida 1992, 191) Before posing this question, Derrida has made us aware of the problems with defining what literature in fact is, asking another question: "Who

decides, who judges, and according to what criteria, that this relation belongs to literature?" (ibid., 187) Taken together, these two questions can be synthesized into one decisive question: "Who decides, who judges, and according to what criteria does the law belong to the law?" Derrida seems to answer the question himself when he argues that "what remains concealed and invisible in each law is thus presumably the law itself, that which makes laws of these laws, the being-law of these laws . . . The law yields by withholding itself, without imparting its provenance and its *site*. This silence and discontinuity constitute the phenomenon of the law" (ibid., 192, my emphasis).

The little extra, then, that makes law into law is that which law hides and never can give away without not being law anymore, and following Derrida we can say that what we see in Bush's memo is law when it has lost that extra, that *supplement* that makes it law. This, then, is not only a matter of formally announcing that the Conventions do not apply, or saying that to the extent that they will be informally applied it will only happen when it does not conflict with military necessity. It is also something a lot less tangible, but arguably a lot more important than that. By showing that the war on terror is *not* the "site" of the Geneva Conventions, and that the type of war that was about to be fought was not covered by the intellectual "provenance" of the Conventions, we come to see that the universality of the laws—and their universality is exactly what makes it impossible to ever find their site—does in fact have a *place* and a *history*: a place and a history that is not and does not cover that of the dark side. This damming up of the law is enough to assign to the law too much and too little for it to remain a law, even if the assignation is just a negative assignation, an assignation of a *not here.*[35]

Again, we have to follow the trail of the memo writers and President Bush and insist on the difference between suspension and non-application the same way that the lawyers appear to have been doing. What is suspended remains in force, if only as a sort of shadow or ghost, and it will keep on grinding against its own suspension. Suspension is an inherently dialectic concept and it is a dialectic concept that, as every dialectic concept, denotes a struggle between forces: the force of law and the force of chaos. In that struggle, suspension never represents giving up on the side of the law. Instead, suspension represents a momentary retreat, a break in an ongoing struggle with the intent of returning to it with renewed vigor. Suspension, in short, remains suspenseful.

Conversely, when something simply does not apply, we are faced with an entirely different dynamic in which any notion of struggle is canceled out, either in the sense that the forces of chaos

35. Put in legal terms, "To dismiss the particulars of one or the other, or to resort to forms of instrumental reasoning or declarations of exceptionalism for their repeated violation is a challenge to the integrity of those legal orders, not merely violants of them" (Perrigo and Whitman, IX).

have finally won, or in the sense that the struggle between law and chaos has lost its meaning entirely. The outcome of such a non-application is the loss of all meaning for the dark side; all appears lost on this side. When Bush claims that the dark side has rid itself of the rights of law, but that he has the power and the will to still treat people "humanely," he sets up a Manichaean world where notions of endless chaos and endless power can live side by side; where the light and the dark side exist simultaneously. And here we find the exact reason for Bush not just denying any application of the Conventions: first he lets the chaotic world of the dark side break through with its power to shatter every meaningful sense of law, but in order not to let this chaotic shattering corrupt his potency as president, he reasserts his power by re-applying the law as "policy" in his own name.

From Law To Violence

With the help of Jay Bybee, Alberto Gonzales, and John Yoo, Bush performed the second destruction: he destroyed the essence of international law by relegating it to the realm of policy and thereby to his own personal grace. The ingenuity of his—or his lawyers'—destruction is that it seems to work through affirmation instead of negation; the wording of Bush's memo does not only hinge on the non-application of the conventions, but on Bush's decision to apply them even though he claimed that they did not apply. But as Pierre Menard teaches us, something dramatic comes with such an affirmation: the Geneva Conventions lose their meaning as law by becoming reliant on the spurious grace of the sovereign. And when law becomes applied through the sovereign grace, it is always, no matter the seemingly benign nature of this grace, an act of violence.[36]

Yet, the most important part of Bush's memo remains its introduction of the notion of non-application of the law due to the "new paradigm" of the dark side; if the first memo in this chapter presented the dark side as a place from which no individual voices could be heard but only a fearful chattering murmur of threats, the second established the dark side as a zone in which the concept of law as such did not apply, and a zone in which the concept of could never apply.

The non-application of law and the non-existence of voices constructed a dark side of radical negativity where meaning had irretrievably been lost and to which meaning categorically could not return. The two destructions that went into this construction were different, but highly interconnected;

36. When the Guantanamo detainee Binyam Mohamed faced a military commission—what Clive Stafford Smith bluntly calls "con-missions"—he thus several times asked *not* to be a part of the proceedings, seeing as he considered them to be a con or a lie; the "justice" faced by men like Binyam was precisely an act of violence disguised as justice, and the U.S. Supreme Court ended up agreeing that the commissions were not fair (Smith, 128).

as we have already seen, an intimate connection exists between voices and law and thus between juristic laws and linguistic laws, and you cannot have one without the other. As Jacques Lacan once put it, “law, then, is revealed clearly enough as identical with an order of language” (as quoted in Evans, 101).

And not only that: with Bush's emphasis that the “new paradigm” was “ushered in by the terrorists” this chaotic non-world appears to have sprung up spontaneously as a phenomenon radically beyond the power anyone, as a continent suddenly emerging from the sea. We almost find ourselves in the strange world of Jeff Vandermeer's *Southern Reach Trilogy* (2014) where a huge part of the United States has been taken over by a strange new world in which suddenly no known laws of nature apply; in Vandermeer's novels this world is called *Area X*, and, as we shall see, the dark side really was a world filled with most unnameable and unknown threats, with *x* amount of horrible threats.

CHAPTER TWO:

A LACK OF POTENTIAL CONSTRAINTS

> I can't fault the man for wanting to keep America safe. But he was willing to corrupt the whole country to save it.
>
> *Lawrence Wilkerson, chief of staff to Colin Powell*

In his February 7, 2002 memo, President Bush questioned the rights of detainees in U.S. custody to be treated according to certain minimal standards by deciding that the Geneva Conventions did not "apply" to the dark side, but could be extended as a grace from his own executive hand. In doing so, he also gave us important clues to what the idea of the dark side really covered: it covered the notion of a part of the world in which no words and no laws could describe or predict anything, where those two great symbolic systems of law and language that structure the lives of most human beings had become void

Nineteen days later, in late February 2002, Jay Bybee at Office of Legal Council gave a new legal opinion, this time not about potential conflicts with international law, but about potential conflicts with domestic U.S. law regarding the treatment of prisoners and constraints on interrogation techniques. If the first two memos were mostly about the construction of a dark side outside the law, this third memo gives us a first indication of what the U.S. torture regime was really all about, doing so by performing the third and perhaps most decisive destruction, namely the destruction of the notion of truth. In the memo, bearing the title "Potential Legal Constraints Applicable to Interrogations" and sent to Jim Haynes at the Department of Defense, Bybee presents a series of concerns about issues with domestic law that might somehow "interfere with the operation of the system that has been developed

to address the detainment and trial of enemy aliens," as his colleagues at the Department of Justice had already called the would-be American torture program (Greenberg et al., 29).

As we shall see, the memo continues and elaborates on the philosophy of non-application whose consequences we already noted in our above analysis of Bush's February 7 memo, while also adding significantly to what had already been set in place.

You Have The Right To Remain Silent

In the memo, Bybee goes into questions of whether the self-incrimination clause of the Fifth Amendment to the US Constitution and *Miranda* protection, based on the Fifth Amendment, would apply to "interrogation of persons captured in Afghanistan" (ibid., 144). Most of us are familiar with the *Miranda* warning, if not from real life then from the "You have the right to remain silent"-speech from countless Hollywood movies; *Miranda* is a constitutionally derived right to not incriminate oneself involuntarily and, following this right, a rule concerning what sort of evidence is admissible in a U.S. court. Consequently, one of the main goals of the rule is to put serious restraints on police conduct, ensuring that no person is subjected to torture or cruel and degrading treatment to force out an confession that can later be used against him or her.

In concluding that *Miranda* warnings should not be issued to detainees captured in Afghanistan, Bybee gives particular emphasis to three points: 1) *Miranda* is premised on a "trial right;" 2) *Miranda* and the Fifth Amendment to the Constitution (on which the original *Miranda*-case was based) is about "protecting the integrity of the trial process;" 3) *Miranda* has its goal to "shape police conduct" through a "deterrence rationale."

That the protections *Miranda* offers is part of a "*trial right* of criminal defendants" [emphasis in original] (ibid., 146), basically means that before being convicted of a crime a criminal has the right to stand trial, and that, at this trial, statements given involuntarily or under coercion are not admissible. Yet, this is not exactly what Bybee chooses to emphasize. Instead, he focuses on the exact opposite: that if one never planned on prosecuting a person in the first place, any notion of *Miranda* or the protections it offers are void. A trial right is only relevant if a criminal prosecution will ever be on the table, but "[i]f the government never uses the statement in a criminal prosecution . . . no question of a *Miranda* 'violation' can ever arise," he concludes (ibid.).

We must be extremely sensitive to the very deliberate tone of Bybee's wording when he gives these seemingly run-of-the-mill opinions: By focusing so strongly on the "*trial right*" of criminal

defendants instead of focusing on the fact that *Miranda* is mandatory in cases of criminal prosecution, he manages to shift the question from whether *Miranda* in principle applies to the Afghan detainees to something entirely different. It is more as if Bybee wishes to say that if the US were to offer *Miranda* (or something to the nature of *Miranda*) warnings to persons captured in Afghanistan this would mean that those same persons immediately gained access to all the protections that the American legal system had to offer, and that this must be averted at all costs.[37] This means, in other words, that extending some very basic rights to the detainees would open a Pandora's Box of other rights and make the detainee "system" impossible to go through with as planned.

The notion of *Miranda* and the protections it offers, then, is shifted from a question of not being necessary to a question of being actively dangerous, and treating people according to the principles which normally apply is not only not needed according to Bybee's interpretation of US law, it is presented as an actual threat that can only be overcome by distancing oneself as much as possible, both *de jure* and *de facto*, from the protections of the Fifth Amendment and *Miranda*.

The second point about the "integrity of the trial process" is an even more haunting read. Here, it becomes clear that everything Bybee has to say about the American legal system functions as a dramatic counter-point to how he envisions that the "system that has been developed" for the detainees should function. After having effectively withdrawn any possible connection, even if it just be associative, between the detainees and a proper U.S. trial, his description of the "integrity of the trial process" is therefore really just a further elaboration or a catalog over what system of checks and balances the detainees will not or should *not* meet.

Trial integrity, according to Bybee's catalog, has two sides to it: the "truth-finding function of a trial" and the principle that "the guilty are not to be convicted unless the prosecution 'shoulder the entire load'" (ibid., 152). It is not hard to see the implications for what we could call the philosophy behind the detainee and soon-to-be torture program: the detention and interrogation of enemy combatants in Afghanistan will not be contingent on any truth-finding function, and, by extension, on the question of truth itself. But the aspect of truth is not all there is to "trial integrity"; the prosecution also has to "shoulder the entire load." Such a claim related to an acknowledgment of the pronounced power and knowledge differential between accuser (the public prosecutor with, in principle, all the resources of the state behind him) and the accused (who, apart from his legal counsel, is one man pitted

37. See Jane Mayer's description of the case of John Lindh Walker for a story of how keeping detainees out of a courtroom was a deliberate strategy (Mayer, 72-79).

against the entirety of the system) – a power differential that, of course, is played out in its most radical version in the relation between torturer and torture victim[38].

Truth and justice, then; two things that, at the outset, were deliberately decided to not be applied or be relevant to the detainees at Guantanamo, not only in the form of a zero-degree of truth and justice, i.e. as an acknowledgment that those concepts were, strictly speaking, not mandatory according to the Department of Justice's jurists' interpretation of American and international law, but in the form of an actively produced fear against even connecting the Guantanamo regime to them.

Suspension or Non-Application

This brings us to the last point in Bybee's enumeration of reasons for issuing *Miranda* warnings (and for not issuing them to Afghan detainees): its "deterrence rationale," its ability, that is, to shape police conduct and prevent police brutality. Put simply, Bybee does not see a need for such a deterrence in the case of the Afghan detainees, because, as he says, "[w]here the rationale of shaping police conduct of law enforcement officers does not apply or is outweighed by other considerations, the Court has consistently concluded that *Miranda'*s requirements do not apply" (ibid., 155).

This argument is interesting since it contains not one, but two arguments whose interaction we are now familiar with: that of suspension and that of non-application. The argument to suspension takes the form of a necessity argument under U.S. law. Bybee elaborates on this argument by citing the case *New York v. Quarles* (1984). We will need an extensive quote to see the ins and outs of this argument:

> In *Quarles*, the police had chased a rape suspect—who was reportedly armed—into a supermarket, where they arrested him, and discovered an empty shoulder holster: A police officer asked the suspect, 'Where is the gun?' . . . The suspect, gesturing toward a stack of soap cartons, replied, 'The gun is over there.' . . . The court held that 'on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and the availability of that exception does not depend upon the motivation of the individual officers involved' . . . The Court explained that in such a situation, the 'need for answers to questions in a situation posing a

38. As Carlos Castresena describes the philosophy behind this paradigm: "The natural tendency of the stronger to abuse its power has to be balanced by the rule of law, which guarantees equal rights and opportunities for every person" (Hilde et al, 135).

> *threat to the public safety outweighs the need*' [emphasis added] for the '[p]rocedural safeguards' imposed by *Miranda* . . . In the context of an armed conflict, it seems readily apparent that *all* [emphasis in original] such information relates directly to the safety and protection of American troops, who are constantly exposed to the dangers of combat. In addition, in this conflict, given the demonstrated ability of the enemy to attack military and civilian targets around the globe, including within the United States (and given the repeated vows to continue such attacks), interrogations for intelligence and national security purposes may additionally develop information critical for thwarting further imminent loss of American lives far from the immediate scene of battle in Afghanistan. Thus, as in *Quarles*, the lives and safety of both the questioners and others will be directly at stake (ibid., 160-161).

The gist of this latter quote represents a "remarkable suggestion," as Anthony Lewis stated in the *New York Review of Books*, since it suggests that "an interrogator who harmed a prisoner could rely on the argument of 'self-defense' as a legal justification—defense not of himself but of the nation" (as quoted in Hersh, 18). In this it is hard not to agree: if the dangers to life, body, and property posed by a military operation were argument enough to remove any constraints on interrogation and torture, torture would be an accepted part of any armed conflict and would not be as universally condemned a practice as it is.[39] Is war not always deadly? Yet, this argument—absurd as it is—remains an argument that still puts interrogations under the auspices of U.S. law; it is an argument that potentially calls for a justification of each and every non-*Miranda* complying interrogations through a careful weighing of whether the exception to U.S. law was indeed justified.

The second argument we are familiar with from the Bush memo of the previous chapter, namely that any laws regarding interrogation conduct are not applicable, plain and simple:

> Indeed, where an interrogation is conducted for obtaining military operations and intelligence information, *Miranda*'s concerns for regulating questioning in the law enforcement context are irrelevant. The goal in such a scenario is not to carefully balance the rights of a criminal defendant under our constitutional system against the needs of law enforcement, but rather to

39. Lewis also says that the torture memos read as a "lawyer advising a mob boss on how to avoid prosecution" (ibid), and this is not the only time the administration was accused of applying mob methods; "these guys are more inbred, secretive, and vindictive than the mafia," as Richard Clarke writes (245)

> ensure that our troops and intelligence officers can extract as much useful information as possible for protecting our troops and securing our military objectives (ibid., 158).

The only relevant thing is information; information that can be "extracted" and put to work to secure "objectives," and this argument therefore refutes the above idea of "balanc[ing] the rights of a criminal . . . against the needs of law enforcement." Once again, we find ourselves in the territory of non-application.

So again, we have two ways of removing legal restraints: one which goes by the way of suspension, one which goes by the way of non-application. The former, when used in this context, is in itself more than problematic since it argues that necessity legally justifies the withdrawal of rights and potential acts of torture when the danger of war is present, and the obvious objection to such a justification is naturally that war is *categorically* dangerous, and that if threats to the lives of soldiers, to equipment or to infrastructure were in fact enough of a general necessity defense to torture, then torture would be an accepted practice in all theaters of war which it obviously is not. But the necessity defense is still a lot less problematic than just saying that rights do not apply as such. Recalling the Bush memo analyzed in the previous chapter, the logic of necessity belongs to the paradigm of "suspension;" and, as we recall, suspension was ultimately left behind in order to choose "non-application." What appears to be an internal argument between suspension and non-application is therefore rehearsed once more in this memo. But while Bybee in his work on the previous memo still subscribed to a logic of suspension, in this newer memo he seems to have learned his lesson: suspension is out, non-application is the order of the day:

> First, and most importantly, under the reasoning outlined above, we have concluded that *Miranda* should not *apply* at all to military and intelligence officers' questioning conducted for obtaining military and intelligence information (ibid., 165).

Bybee, in other words, chooses to go with non-application "first, and most importantly," and thereby forecloses the possibility of remaining within the overall framework of *Miranda* specifically and the American legal system in general, even as a suspended framework.

With this, Bybee also once and for all establishes that detainee operations in the Global War on Terror is not about truth, but about something else, namely "information." In the memo, Bybee builds on the politico-rhetorical strategy employed in the preceding memo where we saw that the protections

of international law were turned into a policy of executive grace. However, instead of destroying the notion of law or of voices, this memo focuses on destroying the notion of truth, which Bybee states himself is central to the American legal system and to justice; instead of truth we get the vaguely defined notion of "information."

What we identified in the Bush memo as the contours of a dark side that had lost all meaning and regularity due to the "new paradigm" therefore finds its exact epistemological correlative here. Knowledge has torn itself loose from any connection to justice and truth, and has instead become a radically immanent concept in the form of information.

But what is information actually, according to Bybee? The following quote from the memo gives us an indication of what Bybee refers to:

> As we understand it, interrogation of prisoners seized in battle is undertaken as a matter of course to determine information such as what units of the enemy forces are operating in the area, their position, strength, supply status, etc., as well as information of broader use for intelligence concerning enemy plans and capabilities for launching strikes against U.S. positions. In the context of an armed conflict, it seems readily apparent that *all* such information relates directly to the safety and protection of American troops, who are constantly exposed to the dangers of combat. In addition, in this conflict, given the demonstrated ability of the enemy to attack military and civilian targets around the globe, including within the United States (and given the repeated vows to continue such attacks), interrogations for intelligence and national security purposes may additionally develop information critical for thwarting further imminent loss of American lives far from the immediate scene of battle in Afghanistan (ibid., 161, emphasis in original).

Information, in short, is everything from specific tactical knowledge about the movements of the enemy on the battlefield to strategic knowledge about the long-term goals of al Qaeda; information is knowledge about everything that is and knowledge about everything that could potentially be. The best understanding of what information is for Bybee is therefore harbored in the tiniest and most inconspicuous word in the quote: the "etc.," found in the third line of the above quote. The "etc." denotes what information is really all about: information is a knowledge which cannot be properly defined or ever gathered completely, but which extends endlessly according to a solely sequential logic – et cetera, et cetera, et cetera.

It is therefore not strange that Bybee's definition of relevant information seems to mirror the criteria for which prisoners were of interest for the U.S. authorities mentioned in the preceding chapter: all "Al Qaeda personnel," all "Taliban leaders," *and* all "non-Afghan Taliban/foreign fighters; and any others who may pose a threat to U.S. Interest, may have intelligence value, or may be of interest of U.S. Prosecution." These criteria—which are not really criteria at all but a carte blanche to arrest all and everyone—correlate perfectly with the "etc." of information: enemies who cannot be properly defined hide information that cannot either be properly defined, and together they come to form an endless spiral of potential knowledge and growing paranoia. The dark side is a side in which not only voices and law have lost meaning, but also truth. Again we have to stress the intimate and inextricable connections between these three concepts and their respective destructions: no law without voices, no voices without laws, no truths without law, no law without truth. The only thing left where truth used to be is an "etc." of information which represents an endless river of still greater and more unforeseen threats.

Paranoia Ensues

The memo's focus on information as the defining epistemological marker of the dark side is a decisive characteristic of the "new paradigm" which was presumably introduced by the terrorists. In order to understand just how important it was, we need to understand some basics about how intelligence worked immediately after the terror attacks.

Immediately after 9/11—when the wheels of the torture regime were set in motion while the nation was busy licking its wounds—a shift seems to have happened in how intelligence as such was procured and evaluated in the higher echelons of government. According to first-hand testimonies, this shift was predicated on the fact that there no longer existed any sorting mechanism for irrelevant information, which meant that so-called "raw" intelligence was passed on directly to the White House.

It is vital to underline how this procedure was both unprecedented and highly problematic seeing as the intelligence community of a country the size of the United States picks up hundreds if not thousands of threats every day, threats which would turn any reader into a raging paranoiac. Richard D. Clarke describes the situation the following way:

> The simple fact is that lots of people, particularly in the Middle East, pass along many rumors and they end up being recorded and filed by U.S. intelligence agencies in raw reports. That does

> not make them "intelligence." Intelligence involves analysis of raw reports, not merely their enumeration or weighing them by the pound. Analysis, in turn, involves finding independent means of corroborating the reports (Clarke, 268).

So, intelligence is actually about rooting *out* the logic of the "etc." by sorting through raw reports and removing the wheat from the chaff; if everything is important, nothing is important, and sorting "raw reports" is precisely what intelligence work is about. In a situation where impossible amounts of information never undergo a process of selection, refinement, or corroboration, intelligence thus becomes impossible, at least in the sense normally implied by the word. Instead of intelligence, raw information becomes the only available currency, with the effect that situations like the following, described by Bob Woodward, arises:

> The CIA was circulating a TOP SECRET/CODEWORD Threat Matrix each day listing the freshest and most sensitive *raw* intelligence about dozens of threatened bombings, hijackings or other terrorist plans. It was chilling, at times containing 100 specific threats to U.S. facilities around the world or possible targets inside the country – embassies, shopping complexes, specific cities, places where thousands gather. Some were anonymous phone or e-mail threats that looked potentially serious; some were just nut cases (Woodward, 96, emphasis added).

All and every piece of information thus appears to have been included as relevant in the daily briefs from the CIA. The access and constant subjection to raw intelligence seems to have dramatically exacerbated "the sense of mortal and existential danger that dominated the thinking of the upper rungs of the Bush Administration" (Mayer, 4).

Another account of this paranoia-inducing stream of raw intelligence is given by Mark Danner in *The New York Review of Books*:

> Every day the President and other senior officials received the 'threat matrix,' a document that could be dozens of pages long listing 'every threat directed at the United States' that had been sucked up during the last twenty-four hours by the vast electronic and human vacuum cleaner of information that was US intelligence: warnings of catastrophic weapons, conventional attacks, planned attacks on allies, plots of every description and level of

> seriousness. 'You simply could not sit where I did,' George Tenet [director of the CIA] later wrote of the threat matrix, 'and be anything other than scared to death about what it portended.'[40]

James Baker, who served as Secretary of State under Bush senior, but was still a part of the inner circle after 9/11, compared reading this daily threat matrix with "being stuck in a room listening to loud Led Zeppelin music," adding that "[a]fter a while, you begin to suffer from sensory overload" (Goldsmith, 72). Unbeknownst to him, this testimony eerily mirrors the experiences of many of the torture victims who, to their immense suffering, would soon be subjected to sensory overload or sensory deprivation at the hands of their U.S. torturers. This, then, is an early indication of the relation between information and torture: James Baker was flooded and overloaded with information, and the U.S. torture regime was set up precisely to organize and get under control this information river running due to the "chill" that this constant stream of threats produced in those in power.

In a world where even civilian airplanes could suddenly be potential weapons, the endless streams of information had to address what, in the most basic of senses, could or would someday be able to constitute a threat or a weapon. The case of José Padilla, who was arrested in 2002 on the account that he was trying to build and detonate a radiological bomb, is instructive in this regard. The CIA used the arrest publicly as an example of the efficacy and justification of the use of enhanced interrogation techniques—it was one of the "eight most frequently cited examples of 'thwarted' plots" of the U.S. torture regime (*Committee Study*, 223)—adding that his arrest had helped prevent a "dirty bomb" from blowing up in an American city. Similarly, U.S. Attorney-General John Ashcroft gave a briefing to the nation per satellite connection from Moscow about the capture of Jose Padilla and the discovery of his plans to detonate a radiological bomb (Smith, 49), invoking the fear of nuclear weapons in the general population.

The fact of the matter, however, was that Padilla and his associate's plot had only reached the level of reading an "article [that] instructed would-be bomb makers to enrich uranium by placing it 'in a bucket, attaching it to a six foot rope, and swinging it around your head as fast as possible for 45 minutes'"(*Committee Study*, 226). Ridiculous and dim-witted as this plan sounds (and is: if a person could even get his or her hands on uranium, enriching it is an extremely complicated process – so complicated, in fact, that it was one of the main problems facing the U.S. when building the first

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40. The New York Review Of Books. "After September 11: Our State of Exception." October 13, 2011. . http://www.nybooks.com/articles/2011/10/13/after-september-11-our-state-exception/

nuclear bombs in the early forties,)[41] the fact that it was circulated as an actual and serious attempt to build and detonate a radiological bomb tells us something significant about just how much all bets were off in these early days after 9/11. The endless streams of information fell back upon the most basic ideas about the world and partook in an act of primordial re-naming where it was no longer only guns or bombs that should carry the name of weapon, but where literally *everything* was threatening and dangerous.

In such an environment, everything and everybody become imbued with an aura of ominous secrecy that cannot in any way be shrugged off. Everything assumes a potential for meaning—deadly meaning—in a sort of perverted, late-modern pantheism where no one and nothing can be just a person or a thing. Such pantheism of destructive potentiality resembles a radically paranoid mental state where everything and every person can possibly be a tool or a tool-user, working towards ends that are not even clear or transparent themselves. It is easy to imagine how such a world must have started to resemble the universe presented in the *X-Men* movies, in which the main villain Magneto can manipulate and move in space everything metallic, from tiny trace amounts of iron in his guard's blood to San Fransisco's Golden Gate Bridge. When watching these movies, the viewer quickly starts to gain an unusual awareness of the physical-chemical properties of materials and objects, specifically whether the props in a particular scene are made of metal and could therefore be a potential weapon for Magneto, or if they are of a non-scary material such as plastic, rubber, or cloth. Surprisingly (but, in the end, not surprisingly at all) it is hard to find a corner of the world where metal is absent: everything is a tool in the hands of evil.

It is no surprise, then, that paranoia is exactly the term used by Lawrence Wilkerson—Colin Powell's former chief of staff—to describe Dick Cheney's frame of mind after the 9/11 attacks; Cheney acted, according to Wilkerson, "as if he were preoccupied with terrible things he couldn't talk about . . . Cheney was traumatized by 9/11. The poor guy became paranoid" (Mayer, 6).[42] Bybee's memo and its claim that truth is a concept which does not apply to the dark side is therefore more than just a random modulation. It is the legal opening of a zone in which a radically different ontology rules, an ontology which correlates perfectly with how the Bush administration chose to approach intelligence. This

41. For an enlightening and entertaining overview of the difficulties of enriching uranium see Richard Rhodes: *The Making of the Nuclear Bomb*, where world-famous theoretical physicist Niels Bohr at one point speculates that enriching enough uranium to create merely one nuclear bomb could only be done if the United States was turned into "one big factory" (294). Of course, that turned out to not be entirely accurate, but it nevertheless serves to illustrate that enriching uranium is not something one just does.

42. David P. Forsythe also argues about the existence of a "national climate of fear if not paranoia," pointing to the fact that the administration's specific choices regarding intelligence reports spread to the nation at large (Forsythe, 89).

approach was defined by streams of paranoia-inducing information, streams whose endless nature in Bybee's memo are marked by the inconspicuous “etc.” and which in the real world came flooding in as the “Threat Matrix.”

While the interpretations of the three memos analyzed here can be—and have been—subject to scathing critique from a legal-scholarly point of view, what has mostly interested us in these two chapters is something slightly different: we have been interested in and tried to document three different but interconnected destructions – the destruction, respectively, of voices, of law, and of truth in the memos. These destructions are not complete, but partial destructions, and they refer specifically to what Cheney called the dark side; the dark side, which had to be “worked,” as opposed to an implicit “light side” in which voices, law, and truth presumably still had a part to play.

What started out as a tentative term is therefore now more clearly fleshed out: the dark side is a voiceless place where no laws or rules apply, and where no finite amount of knowledge can ever act as reassurance, since one piece of information always points on to more information not yet acquired through the logic of the “etc.” Significantly, we also see that these attributes of the dark side are not presented as something which stems from any suspension of the above concepts, but from the nature of the dark side *itself*, as it was “ushered in” by terrorists. Lastly, it is already clear that the dark side represents a very specific version of the “outside” of the law, different from, and even in a basic conflict with Cristoph Menke's conception of the term. For Menke, the law's outside was that which law had to “reflect” itself in; for the Bush administration's the dark side was categorically incommensurable with normal law, it was a zone radically beyond any mirroring of reflection.

But how does the idea of the dark side as we now understand it correspond to other ideas about national security and torture? It is time to take a step back and return to a more conceptual gaze on the idea of an outside of the law and its possible connections to torture.

CHAPTER THREE:

THINKING ABOUT TORTURE

> The authors estimate that current US antiterrorism measures would be cost-effective only if they thwarted a large-scale terrorist attack nearly every day.
>
> *David Luban*

In laying the groundwork for the U.S. torture regime, the legal memos destroy the "self-reflection" of modern law in its outside, and substitutes this self-reflection for a strict compartmentalization of the world into two incommensurable sides: the side where law applies and the side where law does not apply, the side where voices exist and the side where voices do not exist, and the side where truth exist and the side where truth does not exist – the light side and the dark side.

Torture, we suspect, belongs to the dark side, to that side of the divide where the law does not apply and where the gloves therefore can come off. However, we have not yet seen the word torture mentioned even once in the memos and have therefore not yet fully understood its specific function in this legal-political ontology. Where does torture "fit in," so to speak? This is the decisive question and the off-the-cuff answer would of course be that it fits in where we always think it does, namely as a sort of emergency tactic in times of the most severe threats to the survival of innocents or the state. Yet, as we shall see in this chapter, the notion of an emergency or of national security are not, at least when it comes to torture, catch-all phrases, and it is not necessarily the case that the U.S. torture regime can be described according to any "classic" logic of torture done in the name of national security.

This and the following chapter takes a step back from the legal memos in order to argue that we typically perceive of torture and other radical measures taken in the name of national security according to two related, but arguably also conflicting matrices: a liberal matrix centered around the so-called "ticking time bomb-scenario," and a decisionist matrix centered around the notion of the "sovereign" and strong executive action. By comparison, the chapters conclude that neither of these matrices fit into the bipolar world drawn up by the memos we have analyzed so far; in fact, with the help of Cristoph Menke, Michel Foucault, and torture scholar Darius Rejali the chapters will argue that due to the bipolarity set up by the legal memos, the architecture and legal-political ontology of the U.S. torture regime is indeed not something that can be superimposed seamlessly onto neither a liberal or a decisionist model without missing vital insights.

National Security Torture

One way to think about torture is to view it as a contingent, spontaneous response to a severe threat against national security. As Darius Rejali argues in his *Torture and Democracy*, national security torture (what he calls the "National Security model" (Rejali, 46)) is by far the most discussed and supported version of torture, even though torture also happens in democratic societies as the outcome of other structural phenomena such as the need to impose "civic discipline" on certain groups (the "Civic Discipline model" (55),) or the need to extract confessions in societies and legal systems that for various reasons place a premium on these (the "Juridical model" (ibid., 49).)

Interestingly, Rejali argues that civic discipline torture, for instance, is "just as common as national security torture . . . an open secret to people who live in many societies" (ibid., 444), but that it does not catch the headlines the same way that national security torture does. Stephanie Athey's argument of our "imaginary constitution" plays a decisive role in our conceptions of torture might explain why debates about and awareness of national security torture is more ubiquitous than other forms of torture; when torturing is something we perceivably only do under the most dire of circumstances, torture is as marginally entwined with our "imaginary constitution" as possible; it is only something we turn to when the very freedom *not* to be tortured or killed is threatened by terrorists and the choice therefore can boiled down to a choice between us or them, between murderers or their victims.

It is beyond the scope of this dissertation to relate the U.S. torture regime to all instances of torture in Rejali's monumental book, yet it is important to keep in mind that torture often takes other

forms than most of us think about when hearing the word. That being said, it is not surprising that the dominating view on torture is one which implicates us and our perceived values to the least degree possible. A brief glance at the torture debate as it actually plays out also paints a clear picture: no one in their right minds would publicly defend reintroducing juridical torture or torture of the disenfranchised, but public figures have indeed openly spoken in favor of torture in national security emergencies,[43] and they have done so knowing well that a large percentage of the population supports precisely this kind of torture.[44]

This large support for national security torture is bolstered by stories and opinions about the need for torture in times of dire threats to the nation, stories which circulate between the press, politicians and popular cultural narrative in the shape of what Darius Rejali calls "torture folklore" (ibid., 426). Torturing in the name of national security is, in other words, the preeminent Hollywood version of torture to which most of us have been subjected time and again. Yet, the question of torturing in the name of national security is not as simple as it seems. Behind it hides an intricate web of assumptions regarding precisely the relation between law and its outside, a relation which in decisive ways conditions the development and public discussion of torture.

The Bomb Is Ticking

We are all familiar with the scenario and the question that inevitably follows: one or more terrorists have planted a devastating bomb somewhere in a densely populated urban area; the bomb will go off shortly and kill hundreds or even thousands of people (versions also exist with nuclear bombs – the scenario only gets better if you scale it up;) the police has arrested one of the terrorists who knows where the bomb is and how to defuse it, but refuses to divulge this information. Should the police torture the man?

The ticking time bomb-scenario, dilemma, or question—whatever one prefers to call it—has been rehearsed thousands of times in conversations, in movies, and in books and seems so intuitive in its basic question that most people probably perceive it to be just one of those questions that is bound to

43. "Is any jury going to convict Jack Bauer? I don't think so," as U.S. Supreme Justice Antonio Scalia said at a legal seminar in 2007 (as quoted in McCoy, 170).

44. David P. Forsythe refers to a "poll in June 2009 [in which] 40% of Americans sampled opposed a flat ban on torture in all situations" (Forsythe, 5).

pop up again and again as a basic legal and moral conundrum. Yet, in spite of its spread across multiple platforms and genres it has a clearly traceable history: it was, according to Darius Rejali, invented by a film maker and a novelist[45] in the wake of the French war in Algeria in the 1950s[46] – a bloodbath of a war in which torture made a surprisingly quick comeback after the atrocities of the WWII.[47]

Notwithstanding the fact that no known real-life example of the ticking time bomb-scenario has ever been recorded, the scenario's clearly traceable history and its subsequent proliferation must be a testimony to a certain robustness of the core argument and to the way this argument fits into our view of important fundamental ways of viewing concepts such as law, freedom, and the value of innocent lives versus "guilty" lives. The scenario is in other words not just an a-historical dilemma of good versus evil; rather, it says something about a certain way of viewing the world and about a certain legal-political ontology that is proper to a specific way of thinking and living.

The first main point about the ticking time bomb-scenario is that it does not challenge the view that torture is an abject practice that is and should remain illegal. That torture is abject and illegal in the scenario springs analytically (in the Kantian sense of the term) from the very fact that the question of whether or not to torture remains a dilemma: if torture was in fact legal and considered a routine matter there would be no scenario and the dilemma would be moot.

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45. Specifically, the scenario featured in Jean Lartéguy's novel *Les Centurions* (1960) and in Gillo Pontecorvo's movie *The Battle of Algiers* (1965). The former tells the story of how fifteen bombs are kept from going off by torturing the man who planted them. According to Rejali, the book substituted "the ticking bomb scenario for the messy, wholesale process of torture during the Algerian war." (546) According to Rejali, the role of torture in the war was radically different: The French won the Battle of Algiers using numerous informants along with massive force applied to a small, highly controlled zone. Few conflicts these conditions: the Warsaw Ghetto, Soweto, and Gaza City are the closest analogous situations. Routine torture contributed little accurate information, corrupted the French units that used it, and swept up many innocents. . . [D]uring the battle, *at least* [emphasis in orginal] fifteen innocents were tortured for every one FLN operative . . . Torture forced a politics of extremes, destroying the middle that might have coorporated with the French . . . Either torture did not work here, or it created more hostility and more recruits (Rejali, 492). The ticking time bomb scenario, then, was Lartéguy's flattering shorthand for a ruthless torture machine that brutalized thousands of people in order to get at a few guilty ones. The French war in Algeria was nothing less than a bloodbath, and torture did not end up deciding the war in favor of the French, but instead corrupted the units that used it, polarized whatever moderate opposition there might have been, and ultimately threatened the life of the French Republic itself. And yet, the ticking time bomb-scenario survived the war as our preferred way of discussing the question of torture in the name of national security.

46. Alan Dershowitz claims that the scenario goes back as far as to Jeremy Bentham, but even though it seems obvious that the scenario is severely imbricated with utilitarian logics, also this part of Dershowitz' argument is sloppy; the situation to which Bentham refers is not torture to prevent death, but torture to prevent *torture* ("For the purpose of rescuing from torture these hundreds innocents, should any scruple be made of applying equal or superior torture . . . ?" (143).) While torturing to save people from torture is definitely not uncontroversial in itself, the trade-off is most definitely a different one.

47. As Jean-Paul Sartre writes in his preface to Henri Alleg's famous *The Question*: "In 1943, in the Rue Lauriston (the Gestapo headquarters in Paris), Frenchmen were screaming in agony and pain: all France could hear them. In those days the outcome of the war was uncertain and the future unthinkable, but one thing seemed impossible in any circumstances: that one day men should be made to scream by those acting in our name . . . There is no such as impossible: in 1958, in Algiers, people are tortured regularly and systematically." (Alleg, xxvii)

The question "would you torture the terrorist?" therefore bases itself on the assumption that it is posed in a society that has both a formal and an informal ban on torture. Moreover, and perhaps more importantly, the way the question is posed also necessarily implies that if the choice is in fact made to torture in the situation, this choice will not lead to a general legalization of torture; the ticking time bomb scenario does not ask whether we should routinely torture terrorists who threaten innocent lives, it only asks whether we should torture in this one, specific situation where all stars are aligned in a very specific (and hopelessly unrealistic) way.

The ticking time bomb-scenario, then, asks us whether we should break the law on grounds of necessity in order to save countless innocent lives, and in asking so the example implies that there are certain trade-offs which categorically exist beyond the law and which categorically should *remain* beyond the law. The thing that exists beyond the law and henceforth should still only exist beyond the law is a barter of guilty life for innocent lives. Jeremy Wisnewski and R.D. Emerick are therefore correct when they in *The Ethics of Torture* call the ticking time bomb-scenario "economic," and note how "most common conversations about torture tend to employ economic language: the give and take of question and answer, of pain and information, of possible costs and benefits" (Wisnewski & Emerick,16).

Since we know from Darius Rejali that what in fact happened in the Algerian War was that the use of torture had ramifications far beyond that of any isolated barter**,** we can easily debunk the idea of an isolated barter as an instance of what David Graeber calls the "myth of barter"[48] or as yet another case of naive and overly optimistic utilitarianism.[49] This, however, would be missing the point: we are here not first of all interested in the raw facts about torture, but in the normative legal-political ontologies out of which torture grows, and the ticking time bomb-scenario certainly does rely on the idea that basic situations of barter can, do and should exist beyond the law.

The Law and its Outside

48. I borrow this term from David Graeber's *History of Debt – the first 5000 years* in which he debunks the idea that a liberal economic system is in essence merely an extrapolation of the most basic human interaction, namely barter (Graeber, 43).

49. All the classic arguments against utilitarianism apply here with and an even greater force than normally, for instance Hannah Arendt's point that "The trouble with the utility standard . . . is that the relationship between means and end on which it relies is very much like a chain whose every end can serve again as a means in some other context. In other words, in a strictly utilitarian world, all ends are bound to be of short duration and to be transformed into means for some further ends" (Arendt 1998, 153-4). For an insightful discussion of these problems with utilitarianism see also Alasdair MacIntyre: *After Virtue*, pp.62-66

Closely related to the idea (or myth) of barter is something else also implied by the ticking time bomb-scenario: The society in which the dilemma of the ticking time bomb-scenario makes sense must necessarily be a free and open society governed by certain limits to state power and certain inalienable rights for its citizens. This is so for two reasons.

Firstly, if the state were totalitarian the dilemma would take a completely different shape since the terror could be construed to be an act of resistance;[50] we never encounter the ticking time bomb-scenario as a question as to whether or not the Nazi SS should have tortured Claus von Stauffenberg if they had caught him before he managed to plant the bomb intended to kill Hitler, since the system that his act of terror was meant to bring down was a brutal terror regime in itself. In this sense the ticking time bomb-scenario presumes a free and open society, or at least it presumes that the bomb is not planted to bring down an autocratic regime, seeing as that would complicate the dilemma beyond repair.

The second reason that the ticking time bomb-scenario necessarily must assume a free and open society (we will come return shortly to what this means) is more complex, but intimately connected to a main theme of this part of the dissertation, namely the idea of an outside of the law and, in turn, to when this outside becomes a *dark* (out)side as Dick Cheney would have it. We remember that Christoph Menke sees the eighteenth century as the dawn of a new conception of law and its "outside," i.e. that which categorically cannot not be covered by law, but which follows it as its structural twin; we also remember that Menke perceived this outside of the law to be something that the law "reflected" itself in, meaning that the outside was not what we could call a "real" outside, but a "conditioned" outside; we also remember that for Menke, this self-reflection of the law is nothing less than the basis of a democratic society.

In an analysis that may have inspired Menke's, Michel Foucault also argues in his *Birth of Biopolitics* (1978-79) that law was challenged by an "outside" in the eighteenth century. Foucault finds that this challenge to the law came from a very specific place: from the market (place), and specifically from the prices of the goods at the market (place). According to Foucault, in the sixteenth and seventeenth centuries, the prices at the market had been subject to regulation by law according to standards of justice (that no one be cheated, and that the prices be kept at a level where buyers could

50. For a classic account of this problem see Lawrence Weschler's *A Miracle, A Universe* (1990) in which the author lucidly describes the political and ethical dilemmas that surround terrorism and torture in a repressive society, specifically the Uruguay *Tupamaros* who stood behind violent political actions in the sixties and seventies.

afford basic amenities) meaning that the market functioned as a "site of jurisdiction," and that prices therefore essentially formed according to factors external to the market, i.e. legal-juridical factors.

However, in the eighteenth century this changed dramatically. From being a site of jurisdiction, the market suddenly became a site where prices formed according to the logic of supply and demand, thereby pushing back the notion that law had any role to play in the formation of prices specifically and the economy generally. This not only meant that law had its dominance over the market truncated; it meant that the market came to play the role of a "site of veridiction" that would "command, dictate, and prescribe the jurisdictional mechanisms, or absence of such mechanisms, on which [the market] must be articulated" (ibid., 32), meaning, in turn, that the free formation of prices at the market suddenly came to speak a truth about the world that law could not.

The truth that the market spoke was the truth of a world beyond the control of any single individual and beyond law – it was the law's outside. That the market suddenly gained such prominence was due to the fact that it "appeared as something that obeyed and had to obey 'natural,' that is to say, spontaneous mechanisms" (ibid., 31). The keywords here are "natural" and "spontaneous"; in the dawn of the liberal-capitalist system in the eighteenth century, the market comes to represent a sort of law of nature[51] that not only exists, but is an "irruption" (ibid., 33) of a completely new and truer truth into the sphere of law and governance by something which is natural, i.e. necessary and governed by its own, undeniable regularity.[52]

Based on this irruption of a "site of veridiction" a complete recalibration of the power landscape took place in the eighteenth century. In the "old" system of governmental reason (what Foucault, with a not-translatable word, calls "raison d´etat") the state had had a tendency to spread over

51. As Friederich Engels already noticed, the physiocrats' and Adam Smith's "victory" over merkantilism was considered to be a victory of reason over unreason: "Und seitdem die bürgerliche Illusion von der Ewigkeit und Letztinstanzlichkeit der kapitalistischen Produktion dazugekommen ist, gilt ja sogar die überwindung der Merkantilisten durch die Physiokraten und Adam Smith als ein bloßer Sieg des Gedankens, nicht als der Gedankenreflex veränderter ökonomischer Tatsachen, sondern als die endlich errungene richtige Einsicht in stets und überall bestehende tatsächliche Bedingungen" (as quoted in Walter Benjamin, "Eduard Fuchs, der Sammler und der Historiker," (as quoted in Benjamin 1991, 466).)

52. In summing up this decisive point, Foucault writes that "He also tells the sovereign: You must not. But why must he not? You must not because you cannot. And you cannot in the sense that "you are powerless." And why are you powerless, why can't you? You cannot because you do not know, and you do not know because you cannot know" (Foucault 2008, 283). Lucidly, Foucault links this basic epistemological predicament with Adam Smith's invisible hand, claiming that too much focus has been allotted the "hand" and too little the "invisible." As Foucault also says: "the world of the economy must be and can only be obscure to the sovereign" (ibid. 280).

and control all of society through the use of the police force; it had been a police state.[53] The only limiting principle in this matrix was the law:

> [T]his complete governmentality, this governmentality with a tendency to be unlimited, had in fact, not exactly a limit, but a counter-weight in the existence of judicial institutions and magistrates, and in juridical discourses focusing precisely on the problem of the nature of the sovereign's right to exercise his power and the legal limits within which the sovereign's action can be inserted. So, governmentality was not completely unbalanced and unlimited in raison d'État, but there was a system of two parts relatively external to each other (ibid., 37).

The power of the sovereign and the limits to this power set by the law was exactly connected to the historical constitution of the state as such; legitimacy, and the limits to this legitimacy, were historical questions. However, with the advent of the market as a "site of veridiction," this historical two-part system between law and sovereignty shatters; suddenly, the question is not that of a state which wants to grow uncontrollably within the historical outer limits set by the law; the question is to ascertain which regions of the society the state, according to the truth expressed by the market, should intervene in and even more importantly which regions it should stay out of. From the basic question having been how far the state could grow within certain historical-juridical limits, the question suddenly becomes that of the frugality of government; and frugality is the basic "question of liberalism," a question which is linked both to utility maximization (the economy works most efficiently without government intervention) and individual rights (there are certain rights that the government may not impinge on.)[54]

How We Used To Do It

When parsing the recent history of terrorism against the United States, it is clear that the question of the limitation of government has defined the approach to this threat in a very real way. In 1968, for instance, no less than twenty-two American airplanes were hijacked by terrorists (Naftali, 37)—

53. "This was precisely the main characteristic of what was called at the time police and which at the end of the eighteenth century will be called, already with a backward glance, the police state. The police state is a government that merges with administration, that is entirely administrative, and an administration which possesses, which has behind it, all the weight of a governmentality" (ibid. 37).

54. And the "question of the frugality of government is indeed the question of liberalism," as Foucault notes (ibid. 29).

equaling an outrageous average of one high-jacking every sixteenth day throughout the year—without resulting in any serious boosts to airport and flight security or in severe U.S. action against the countries that offered safe-havens for the terrorists.

While this seems absolutely surreal with post-9/11 eyes, the majority of those directly involved in fighting against the hijackings back then simply did not think that the backlashes to the economy or the impediments to easy and convenient flying which heightened security measures would bring with it was a worthy trade-off to prevent hijackings; hijacking was a part of the life of a superpower in a world with increased mobility of people and ideas, and when Senator James Eastland exclaimed with regards to the problem that "We've got all the laws that we need" (ibid. 20), he thus seemed to express the general sentiment.[55]

If the basic issue for liberalism is "the utility value of government and all actions of government in a society where exchange determines the true value of things" (Foucault 2008, 46) as Foucault argues, then serious government intervention against terrorists in the sixties was simply deemed to offer too little benefits to prompt serious action and too much of an encroachment upon the freedom of the traveling segments of the population.

The link between anti-terrorism and limiting government intervention as much as possible is also emphasized by the fact that any initiatives to thwart terrorism in the sixties were met with active resistance from the airlines themselves, who argued that a profound upgrade of security measures (including screening every passenger before letting them board the plane as is standard everywhere today[56]) would be detrimental to their earnings and to the convenience of the passengers. This stance linked in a very direct way the issue of terrorism to that of a free-flowing economy and the unimpeded travel of the economic actors: like businessmen circulated around the globe in airplanes, so did terrorists, and any attempt to really foreclose the possibility of hijackings through extensive, expensive, and time-consuming security measures would sacrifice the benign spontaneity of the former in order to root out the latter.[57]

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55. As Timothy Naftali writes in his book on the history of terror in the U.S., "terrorism was long treated as a speck in Uncle Sam's eye" as a "distraction from the 'real' or strategic threats to the country" (Naftali, 325).

56. As an FAA spokesman said in 1968 "It's [hijacking] is an impossible problem . . . Short of searching every passenger" (Naftali, 22). What the spokesman clearly meant was that searching everyone was a ludicrous suggestion. As Naftali notes, "In 1968, 'searching every passenger' seemed a fantastic overreaction to the apparent threat" (Naftali, 22).

57. Later, during the War On Terror, the free flow of detainees would be added to this circulation – a phenomenon which has been analyzed brilliantly by Trevor Paglen in *Torture Taxi*, where he documents the traffic of CIA planes to and from various black sites around the globe by analyzing publicly accessible material about the planes and conferring with a rarely represented group of people in critical theory, namely plane spotters.

Eventually, when the hijackings started costing lives the attitude towards terrorism did change, but this did not mean that the links between free trade and terrorism disappeared. Even after President Nixon in a statement of September 11, 1970 had warned that the U.S. would hold those states responsible who supported terrorists by letting hijacked planes land on their territory,[58] the National Security Council still advised that using economic sanctions would be "declaring ineffectual economic war; costing ourselves business to no end other than the marginal gains of a moral stance on the issue" (Naftali, 51). The question of terrorism and of whether or not it was possible to fight it as anything else than an annoying but inevitable bi-product of free commercial airline traffic, then, was immediately inserted into an economic matrix, not only through the weighing of whether or not employing economic sanctions would be a costly, yet inefficient posturing, but also by discussing "moral stance[s]" in the terms of "marginal gain," a term also borrowed from economics.[59]

Following this point, we only have to go back less than half a century to find that the idea of not negotiating with terrorists—which seems almost a truism today—was not at the core of U.S. anti-terrorism policy; the United States did in fact settle many hijacking incidents through back channels. Only when Nixon—in what Timothy Naftali describes as him "blowing off steam" (ibid., 70)—exclaimed that "we will not pay blackmail," did the United States adopt the well-known non-concessional stance towards terrorism to which it still subscribes. Prior to this change in U.S. attitude, terrorism in the air was an issue which could not be disentangled from economic questions. From the idea that it was the inevitable consequence of high mobility, over the notion of "marginal gain," to pragmatic *ad hoc* trades with terrorists, terrorism remained part of a bigger dynamic between law, economy, and personal freedom.

This quick rundown of recent American history of terrorism is instructive in two ways. First, because it shows that there are strong historical precedents for meeting terrorism with something other

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58 The American Presidency Project. "291 – Statement Announcing a Program to Deal With Airplane Hijacking." September 11, 1970. http://www.presidency.ucsb.edu/ws/index.php?pid=2659&st=&st1=

59. The link between security and the economy also worked the opposite way; when the Brazil took a turn towards the lef in the sixties under president Joao Goulart, a "Bussines Group for Latin America" was created which included large American corporations such as Chase Manhattan Bank, United Fruit, Ford Motors, and Standard Oil (Langguth, 104). This group met with President Johnson and his advisers, lobbying for assistance to the military coup which would eventually depose Goulart. The U.S. supported the successful coup and subsequently sent some of its hundreds of "Public Safety Advisers" to Brazil to advice the Brazilian police (ibid. 40). Among them were Dan Mitrione who would train hundreds of Brazilian officers in torture: "[T]he police were torturing prisoners with a rudimentary electric needle that had come from Argentina. Mitrione arranged for the police to get newer electric needles of varying thickness," as John Langguth writes (ibid. 251). Mitrione was eventually killed by the Tupamaros in Uruguay.

than knee-jerk infringements on personal liberty. There is a price to pay for freedom, but it is not necessarily the price that President Bush spoke about in 2002, and no matter what, this price must, according to the principles of limits to state intervention, be subject to constant bargaining, as indeed it very much was prior to 9/11.

Second, that terrorism is not a unequivocal term, but that acts of terrorism form a continuum going from more to less accepted. While it is obvious that the lack of strong government initiatives in flight security did indeed follow from a basic unwillingness to intervene, as events moved farther out along the continuum, things got more muddled, until, finally, terrorism came to be viewed with a severity which still may not hold a candle to the paranoia of today, but which was definitely more than just a shrug of the shoulders. What is important here is that the idea of an "outside" into which it is impossible to intervene is essentially only a limited outside; the U.S. *could* do more than just ignore problems with flight security, but only did so when things got so out of hand that the threat was impossible to ignore.

This leads us to an important realization, which Foucault is also very adamant about, namely that the economy considered in classic liberalism as an "outside" governed by its own inscrutable principles is only accepted on the basis of a contract in which its net effects remain benign (Foucault 2008, 102); there are certain things which categorically cannot be accepted and which even a liberal state run according to principles of frugality must guard itself against vigorously, even if doing so means integrating parts of the outside into the well-regulated sphere of the inside. As Ben Anderson describes it, liberalism faces a "problem of the relation between 'good' and 'bad' circulations" (Anderson, 781), a problem, that is, with the inevitable occurrence of unintended, negative, and even threatening event which stem from the free movements of people and ideas in a free society.

As the most extreme example of such a threatening event we find the ticking time bomb scenario where one or a few terrorists are about to kill hundreds or thousands of civilians, and we are asked if we would or should torture the terrorist. What is about to happen—i.e. the murder of tons of civilians—is unacceptable, but so is what has to be done to prevent this from happening, i.e. torture. Yet, the problem that this scenario poses is not resolved by an adjustment of policies or through law's "self-reflection" in its outside, since a formal legitimization of torture—which is presented as the *only* way to save thousands of lives—would essentially equal short-circuiting the whole liberal matrix, not only because it would be to impinge on the personal rights of the specific terrorist who is tortured, but

because it implies that there really is a "dark side" where chaos reigns and to which the only realistic answer would be turning away from the liberal state and back to a police state.[60]

We see therefore that the dilemma which the ticking time bomb-scenario poses is not only something which can take place in a liberal society, but that the dilemma is in a sense the *emblematic* liberal nightmare, spoken by the subconscious of the liberal mind telling us that the idea of rights that lie beyond the power of law or sovereignty to tamper with is unsustainable. Luckily, the ticking time bomb-scenario comes with its very own workaround for this problem, not only making the scenario a liberal nightmare but, in a sense, also a liberal dream.

Bureaucracy Rules

The way the ticking time bomb-scenario works around its nighthmarish implications is simple: it isolates the act of torture by always implying that the situation is an extreme case, and by assuring us that if we choose to torture it will not mark the beginning of a general regime of torture. The way it does so is a testimony to the narrative ingenuity of those who use the scenario, and it relates to what we could call questions of narrative agency. In the ticking time bomb-scenario, the question is usually whether *you* think that the person should be tortured. But who is this "you" actually? Is it the you right there, you the person who discusses the scenario? Or is it you as in "us," "one," or "society"? If so, who or what represents "society" in such a case?"

In his book *Torture and The Ticking Bomb* (2007), Bob Brecher parses a handful of ticking time bomb-scenarios and their justifications of torture, tearing apart lucidly the assumptions and logic on which they rely. One of the books he quotes is Sanford Levinson's anthology *Torture*, a collection of texts which, according to the *London Review of Books'* review, shows that not only "neo-cons in the White House" are "in thrall to romantic notions of danger and catastrophe. Academics are too" (as quoted in Brecher, 17).

Levinson's book has been subject to much criticism due to its colporting of myths and justifications for torture disguised as thoughtful and often "liberal" philosophizing, and rightfully so. Yet, exactly because of the extent to which many of its texts rely on "torture folklore," Levinson's collection is instructive if we want to grasp the assumptions behind the ticking time bomb-scenario.

60. With David Luban, we could also frame this point differently by following his lucid point that there is, essentially, no conflict between "security" and "rights" (or liberties, as he calls it,) since rights are just *another form of security*, namely "security against abuses of the government's power" (Luban, 29).

The following segment is taken from Professor of Social and Political Ethics Jean Bethke Elshtain's contribution:

> A bomb has been planted in an elementary school building. There are several hundred such buildings in the city in question. A known member of a terrorist criminal gang has been apprehended. The authorities are as close to 100 percent certain as human beings can be in such circumstances that the man apprehended has specific knowledge of which school contains the deadly bomb, due to go off within the hour. He refuses to divulge the information as to which school, and officials know they cannot evacuate all of the schools, thereby guaranteeing the safety of thousands of school children. It follows that some four hundred children will soon die unless the bomb is disarmed. Are you permitted to torture a suspect in order to gain the information that might spare the lives of so many innocents (Levinson (ed.), 78)?

Apart from showing the peculiar narrative ingenuity that always characterizes this specific genre of torture advocacy (for good measure Elshtain even adds that "The circumstances are desperate. The villain is thoroughly villainous,") Elshtain makes a peculiar, yet typical grammatical leap in the last sentence: from having used the term "the authorities" as the grammatical subject, she all of a sudden substitutes this for "you," asking if "you" are permitted to torture. Why not just stick to the authorities? Why not just ask if the authorities are permitted to torture?

In Alan Dershowitz' *Why Terrorism Works* (2002), we are presented with another version of this strange game, this time in the context of a sort of counter-factual history where the government did in fact become aware of the threats to the U.S. in the weeks prior to 9/11 by arresting Zacarias Moussaoui (he was in fact arrested) and searching his computer (his computer, however, was *not* searched):

> The government decided not to seek a warrant to search his computer. Now imagine that they had, and that they discovered he was part of a plan to destroy large occupied buildings, but without any further details . . . The attack now appeared to be imminent, but the FBI still had no idea what the target was or what means would be used to attack it. We could not simply evacuate all buildings indefinitely. An FBI agent proposes the use of nonlethal torture—say, a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health of life, or the method used in the film *Marathon Man*, a dental drill through an unanesthetized tooth (Dershowitz, 144).

Again, we cannot fail to notice the bizarre narrative drive behind Dershowitz' narrative or the way he seems to find his knowledge about torture in Hollywood thrillers from the seventies.[61] Most importantly, however, is the way the agency shifts: the government starts, the FBI takes over, but when it is time to torture, all agency is allocated to one single individual, an "FBI agent" who "proposes" to torture. Again, we must ask: why not just stick with the "government" or the "FBI"? What is it that always makes the choice of torturing in the ticking time bomb-scenario rest with one specific person?

The answer is, again, related to what we have deemed inherently "liberal" (in the sense employed by Foucault) of the ticking time bomb-scenario: The "you-ness" of the example testifies to an idea about epistemological and ethical privilege where it is only the person in the actual situation who is able to gauge whether or not to torture, not someone far removed from the actual events. By placing the choice to torture in the hands of one single individual functions as a sort of "quarantine" of the whole situation and its legal-ethical dilemma which is precisely that the benign outside of law[62] suddenly threatens to become a menacing dark side. There can and must be no general rule to guide you in deciding whether or not torture, and if there is a barter to be made, it is to be made by a single individual who decides to act spontaneously in the heat of the moment according to his or her judgment of the situation. By imagining that the situation, the torturer, and the torture can be "quarantined" in this way, the ticking time bomb-scenario overcomes the fact that the dilemma it presents us with is a dilemma that exists at the heart of a liberal society, and that the scenario therefore is not qualitatively singular or unique (it was essentially the dilemma faced time and again by the U.S. government in connection with the many hijackings in the late sixties,) but only appears so due to the enormity of the stakes involved.

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61. Even more bizarre is it that Dershowitz would choose his example of torture from a movie in which torture does not work (since the victim, played by a young Dustin Hoffman, does in fact not have the information his torturer is looking for) and in which the torturer is a Joseph Mengele-type doctor who brings the depravities of his Nazi past into the present day of the movie; there are a plethora of movies and books where the ticking time bomb-scenario plays out according to the gameplay set up by the torture proponents, and yet Dershowitz refers to the one movie which seems to dramatically disprove his point: torture does not work, and torture is something that metastases through time and space with the men and women who perform it.

62. By this I do not mean to imply that Foucault, in the lecture series on which I build this argument, comes out as a staunch advocate for classic liberal capitalism; what Foucault points out is that *within* the framework of liberalism, the "outside" beyond the state and the law is considered a fundamentally benign outside which brings prosperity and freedom. In fact, Foucault mentions time and again that the idea of freedom in liberalism is in no way absolute, but only a way to produce *some* freedoms while simultaneously producing several other constraints: "Liberalism must produce freedom, but this very act entails the establishment of limitations, controls, forms of coercion, and obligations relying on threats, etcetera" (Foucault 2008, 64). Foucault even goes so far as to argue that "comparing the quantity of freedom between one system and another does not in fact have much sense" (ibid., 62).

Yet, the insurmountable problems of the ticking time bomb-scenario *as* scenario spring exactly from this same attempt at quarantining as well; it is as if the proponents of torturing in just such a case do not appreciate that the extremely formulaic narrative packaging of the scenario disproves any claim to haecceity and thereby effectively breaks the quarantine from the outset. In chapter 1, we touched briefly upon the relation between law and narrative, and now we meet it again: in its attempt at quarantining, the ticking time bomb-scenario may claim to be as far removed from legal formalization of torture as possible, but the fact that it remains a recipe for when it is okay to torture for so many people who otherwise would oppose torture, means that it *is* in fact something law-like. The ticking time bomb-scenario is a narrative template, and every template—be it narrative or physical—is always something used for convenient copying or replication. There can be no uniqueness to a situation for which a template exists.[63]

No Dark Side

We have used the ticking time bomb-scenario to describe a basic liberal imagination about national security torture. In this imagination, the legal-political ontology of an open society with a benign "outside" characterized by the free movement of people, goods, and ideas is suddenly turned on its head, becoming a dark, threatening side where terrorists can freely plant timed bombs in our cities. The dilemma of the scenario is that torture is categorically what the state is *not* allowed to perform in such societies for the exact same reasons that the benign outside of law exists in the first place, namely that there are certain things that the state can and should not do.[64] The dilemma then, is that between the evil of terrorism and the evil of torture, and it is solved by putting the seemingly totalitarian choice of torturing into the hands of one single individual in one single situation, thereby isolating the choice to torture and preventing it from spreading to the general fabric of society.

The ticking time bomb-scenario is a liberal nightmare because it showcases a conflict at the root of the liberal matrix; but it is also a liberal dream because it postulates that this conflict can be isolated

63. In this specific sense, Slavoj Zizek is right when he refuses to even discuss the viability of torture in his *Welcome to the Desert of the Real* because it "changes the background of ideological presuppositions much more than its outright advocacy" (Zizek 2012,104); or when Ariel Dorfman—the author of the play *Death and the Maiden* about Chilean victims of torture— with even more poignancy states that "I cannot bring myself to use them [the arguments against torture], for fear of honoring the debate by participating in it" (Hilde et al., 114).

64. It is no coincidence that torture was abolished in the exact same period described by Foucault, when liberalism became a technique of government.

to one specific instance of a threat and the torture used to thwart it.[65] This strange duality of the scenario is the reason for its consistent appeal to torture proponents, to TV shows and movies, and to the population at large; it lets us feel the shivering cold of the dark side, but it assures us that it is nothing but a glitch in the system, and that this glitch can, if not be resolved, then at least be isolated without giving up our freedoms for good.

Since our interest is in how specific existing ways of viewing the world in certain situations can lead to torture, and to what extend the notion of a dark side as a defining feature of the U.S. torture regime can be said to conform with these, we have not dwelt very much on real cases of the ticking time bomb-scenario, nor have we attempted to debunk any claims to the ticking time bomb-scenario's realism (or lack thereof) or concerned ourselves with more formal ethical problems.[66] As should be clear from our analysis of the ticking time bomb-scenario, the basic architecture of the scenario at a very basic level puts it at odds with the idea of a dark side, both with regards to the scenarios reliance on torture being a radically isolated event, a one-off or even a glitch, and with regards to the scenario's underlying assumptions about the benign outside of the law.

The idea of a bipolar world, a world, that is, which is sliced up into a light side and a dark side which are radically incommensurable, is simply not a world that complies with the idea of an isolated act of torture, happening spontaneously as the choice of one single actor. The outside of the law in the liberal idea—at least the version theorized by Foucault—is, in essence, a benign outside and definitely not a "dark side," and, importantly, everything in the ticking time bomb-scenario is made so as to keep it that way.

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65. As David Luban puts it: "These ideas allow us to construct a liberal ideology of torture, by which liberals reassure themselves that essential interrogational torture is detached from its illiberal roots. The liberal ideology of torture is expressed perfectly in "ticking-bomb hypotheticals" designed to show that even perfectly compassionate liberals . . . might justify torture to find the ticking bomb" (Luban, 45).

66. For a classic, yet lucid account of the ethical problems of the ticking time bomb-scenario see Henry Shue's much quoted essay *Torture,* or Bob Brecher's *Torture and the Ticking Bomb* and David Luban's *Torture, Power and Law*

CHAPTER FOUR:

UNITARY EXECUTIVE(S)

> Pres. seriously weakened in recent yrs. Restore power & auth to Exec Branch — Need strong ldr'ship. Get rid of War Powers Act — restore independent rights.
>
> *Note from Dick Cheney to James Baker*

It is clear from Michel Foucault's description of liberalism that it poses challenges to classical notion of sovereignty. While these challenges may seem to just be curiosities of history, they are in fact not; we have already seen how questions of economy and of the earnings of private enterprises very much limited President Nixon's possible answers to terrorism and his ability to take strong political measures against foreign nations who harbored terrorists.

Further, we have seen how the only way torture traditionally has been imagined in this liberal framework is if it grows organically from a unique and massively threatening situation which most of us recognize as some version of the ticking time bomb-scenario. We have also seen how the assumptions and conditions on which this scenario relies cannot in any reasonable way be reconciled with the world of the legal memos: If the bipolar world that the legal memos draw up created a rampant torture regime—which it did—it therefore certainly did so according to a different logic than the one we find in the ticking time bomb-scenario. It is, in short, not in the ticking time bomb-scenario that we are to find answers to the specific nature of the link between the legal memos, the dark side they construct, and torture.

Executive Prerogatives

Not only is the Nixon presidency's way of meeting the terrorist threat in the late sixties instructive by showing that terrorism is not a catch-all phrase, but covers a continuum of possible threats to the nation that are and should not all be met with the same level of government intervention and severity. The ultimate fate of the Nixon Administration also left lasting marks on the role of the office of the executive which would, thirty years later, come to play an enormous role in the creation of the U.S. torture regime. According to Charlie Savage's account in *Takeover – The Return of the Imperial Presidency* (2007), Dick Cheney was so deeply affected by the encroachments on presidential power that followed from the Watergate scandal, that he states in 1996 "I think there have been times in the past, oftentimes in response to events such as Watergate or the war in Vietnam, where Congress has begun to encroach upon the powers and responsibilities of the President; that it was important to go back and try to restore that balance" (Savage, 9).

If the executive office came under vastly increased scrutiny in the seventies, so did the CIA. While the investigation of the Watergate scandal was rolling, the director of Central Intelligence thus asked that a report be compiled about questionable or illegal operations made by the CIA in the past, a report from which various bits of information eventually ended up leaking to the public where it has since been known as CIA's "family jewels" (ibid. 30). The family jewels contained lots of spectacular revelations concerning various illegal assassination attempts on foreign leaders, among them most prominently Cuba's Fidel Castro, and ended up spawning a Senate investigation led by Senator Frank Church.

What is important to realize here is that the encroachments upon the powers of the executive office and limits to the CIA's illegal activities are to a certain extent two parts of the same coin; "no one can understand . . . the behavior of the CIA who does not understand that the agency works for the president. I know of no exception to this general rule," as journalist Thomas Powers writes (Powers 2008, 5). But the CIA does not only work for the president when it carries out exotic assassination attempts on leaders of foreign nations; the CIA has also traditionally been the scapegoat when these attempts go wrong, as they inevitably seem to do. The connection between the executive and the CIA is therefore especially strained when things do not go as planned, and eventually the "[t]he pattern of blaming the CIA for what presidents have ordered it to do" ended up creating what has been called a "risk-averse culture" within the agency (ibid. 9), i.e. an aversion against carrying out operations that, if they fail, might backfire and end up in yet another blame game against the CIA.

Concerning the revelations about the CIA's controversial operations in the past, Dick Cheney, then Deputy Assistant to President Ford, wrote in 1975 that "[a]t the present time, we have no clear guidelines, no coherent policy developed for responding to Congressional requests generated by their investigation of the intelligence community" (Savage, 30). By writing so, he makes it clear that he himself also saw a clear link between encroachments on the executive office and public shaming of the CIA. So when Cheney in 1996 aired the opinion that a "balance" had to be "restored"—i.e. that the encroachments on executive power that had taken place since the seventies had to be reversed—it stands to reason that this also entailed creating a situation where the CIA's "risk-averse culture" could be shed and the Agency could once again engage in dangerous and legally murky missions on the behest of the president. It is, in other words, not strange that Cheney, when he got the chance and opportunity, would end up creating an extra-legal torture regime through a coalition between the White House and the CIA.

The Unitary Executive

That the Bush Administration would attempt to tinker with decade old checks and balances of American government should therefore come as no surprise. And while the events of 9/11 naturally gave ample opportunity for such tinkering, the administration had already begun redefining the role of the presidency well before the terror attacks, again not in order to meet any specific threat, but as a matter of principle and to counteract what Dick Cheney and his aide David Addington perceived to be a dangerous erosion of executive power (Johnsen, 395).[67]

Many others who supported this widening of presidential power had, like Cheney, been in the game for decades, changing public office for lucrative positions in private companies when the political tides turned, and now returning to serve in the Bush presidency. Another favorite aversion to many of the top players of the administration was the so-called policy of *détente* of the seventies and the loss of U.S. sovereignty that this approach to nuclear disarmament and global safety presumably brought with it.

In order to follow through on this agenda, President Bush already in his acceptance speech for the Republican nomination aired his desire to abandon the Anti-Ballistic Missile Treaty which had

67. Cheney and Addington discovered that they were kindred spirits when they both supported the minority report about the Iran-Contra scandal, which perceived the whole thing to be a consequence of an "aggrandizing theory of Congress' foreign policy powers that is itself part of the problem" (Goldsmith, 87).

outlawed the creation of effective defenses against intercontinental missiles since the seventies:[68] "Now is not the time to defend outdated treaties but to defend the American people," Bush said (Mann, 256).

At first glance, Cheney and Bush's view of the role of the executive seems to be tapped from a classic conservative strongman rhetoric, and while this might be so, underneath it lay what can be dubbed a coherent philosophy of how the Constitution's separation of powers should really be interpreted which heralded back at least to the Reagan Administration. As part of the onset of neoliberal reforms in the 1980's, Ronald Reagan pushed for deregulation in various sectors, among these deregulation of laws against air and water pollution. As he met with resistance from Congress, Reagan turned to "other tactics" in order to push through his agenda, these tactics consisting of an aggressive policy of appointing only politically friendly officials to key positions and of demanding that regulatory agencies submit their rules to the White House for "cost-benefit analysis" (Savage, 47).

Eventually, these tactics ended up enraging his political opponents so much as to create a demand for an independent investigation into the actions of several officials, a demand which Attorney General Edwin Meese had no choice but to comply with. However, alongside this independent investigation, Meese also commissioned another report, this time from the Department of Justice's "Domestic Policy Committee," a think tank with a strong conservative and activist agenda. The report, called "Separation of Powers: Legislative-Executive- Relations," presented nothing short of a revolutionary vision of the relation between the executive and legislative branches which extended the president's powers significantly by attempting to curtail the power of Congress over the executive through, among other things, a highly activist use of presidential "signing statements."[69]

This highly activist interpretation of the separation of powers was dubbed the "Unitary Executive Theory," a term first used by Ronald Reagan in the later part of his presidency and taken up again by key players in the Bush Administration. Washington Post's Dana Milbank called it an "obscure philosophy,"[70] but if the philosophy itself were obscure, its effects were definitely not. Among the powers who those advocating the unitary executive philosophy wanted restored to the presidency was the unlimited authority to wage war in which ever way the executive deemed appropriate—which

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68. The establishment of a full-scale missile defense system had been banned in the seventies through the so-called ABM treaty, signed by the U.S. and Soviet Russia. The logic behind the treaty was that if any of the two nuclear armed superpowers could feel safe from attacks from its counterpart by having such a system, the doctrine of mutually assured destruction (or MAD, as it was appropriately shortened to) would no longer act as a deterrent for the use of nuclear weapons

69. For a critical analysis of the function of signing statements in the American context see Johnsen "What's a President to do? Interpreting the Constitution in the Wake of Bush Administration Abuses"

70. The Washington Post. "In Cheney's Shadow, Counsel Pushes the Conservative Cause." October 11, 2004. http://www.washingtonpost.com/wp-dyn/articles/A22665-2004Oct10.html

meant ignoring the War Powers Resolution that had been in place since the seventies[71]—and that the executive had the supreme authority to decide on how to interrogate prisoners,[72] thus creating, in the apt words of Alphonso Lingis, a "United States War President" (Hilde et al., 107).

Lingis' term might seem jocular, but it hits the mark quite accurately. Bush never referred to himself as the United States War President, but he did incessantly refer to himself as the Commander-in-Chief, thus discursively marking and emphasizing his role as the supreme leader of the armed forces. This, in turn, connects to the broader trend of a "militarization of civilian life," noted by David Luban (Luban, 21), where more and more civilian functions are taken over by a military logic and, accordingly, by the leader of the military, i.e. the Commander-in-Chief – for instance the militarization of rules concerning detention.

The State of Exception

A strong link can therefore be traced between the "unitary executive" philosophy and the Bush Administration's unilateral war policies. This link has, in turn, been tied to greater notions of the sovereign's role in so-called "states of exception," a concept of national emergencies which plays a prominent role in the legal philosophy of German legal philosopher Carl Schmitt.[73] In commenting on what he also notices as Bush's "decision to refer to himself constantly as the 'Commander in Chief of the Army' after September 11, 2001," Italian philosopher Giorgio Agamben for instance argues that the peculiarities of the Bush rhetoric, "must be considered in the context of this presidential claim to sovereign powers in emergency situations" (Agamben 2005, 22).

In the previous chapter, we discussed the ticking time bomb-scenario as an imminently liberal conception of when torture can and should happen due to how the scenario's micro-narrative and its underlying assumptions are problems bred by the specific relation between law and its "other" in the liberal paradigm. We also noted that the conflict of the dilemma is imagined to be resolved by "quarantining" the torture as one, isolated instance which stands radically outside the normal system of

71. The War Powers Resolution meant that no president could wage war for longer than 90 days without Congressional approval (Mayer, 46).

72. "[I]n order to respect the President's inherent constitutional authority to manage a military campaign . . .[the prohibition against torture] must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority" (Greenberg et al., 256).

73. See for instance: Thomas P. Crooker: "Overcoming Necessity: Torture and the State of Constitutional Culture," and Sanford Levinson: "Constitutional Norms in a State of Permanent Emergency."

law and its outside, thereby disabling the basic dilemma of the ticking time bomb-scenario from spreading to the general fabric of society. We also concluded that the core narratives in this framework are far removed from that of the Bush administration's legal memos, even though various torture proponents repeatedly referred to it.

With the connection Agamben makes between "sovereign powers in emergency situations" and President Bush's evocations of his Commander-in-Chief-powers, we are presented with a different idea of how torture can enter a democratic society in times of crisis, an idea which at first glance seems more in line with what we meet in the memos. While in the ticking time bomb-scenario it was vital that the torture springs organically from the actors that are directly involved in finding the proverbial bomb, the idea of sovereign emergency powers changes the locus of any extralegal act of torture from that of spontaneous actors on the ground to that of the executive – or, in the language of Carl Schmitt, to the *sovereign*.

In Schmitt's philosophy, the link between the sovereign and a state of emergency is not coincidental, but constitutive; in fact, Schmitt famously opens his *Political Theology* (1922) with the sentence "Sovereign is he who decides on the [state of] exception" (Schmitt 2005, 5).[74] The concept of the state of exception and the role of the sovereign as the one who "decides" on the state of exception are decisive for Schmitt not only in their specific relation to emergencies, but because they show the general importance of the "decision" in any legal order:

> After all, every legal order is based on a decision, and also the concept of the legal order, which is applied as something self-evident, contains within it the contrast of the two distinct elements of the juristic-norm and decision. Like every other order, the legal order rests on a decision and not on a norm (ibid. 10).

The law, then, cannot be applied as something "self-evident," and this is so because law, according to Schmitt, does not contain the logic of its own application; the law, as a general and abstract proscription, cannot be applied to a specific and concrete reality without there being some mediating

74. This is actually a quite misleading translation; the original line reads "Souverän ist, wer über den Ausnahmezustand entscheidet" (Schmitt 2009, 13) – the original version, then, emphasizes that the exception is not just an exception but a *state* ("Zustand",) thereby making a decisive distinction between exceptions in general and the specific concept of the State of Exception. (Schmitt himself is very aware of this distinction when he in the next section argues that: "Daß der Ausnahmezustand ein allgeminer Begriff der Staatslehre zu verstehen ist, nicht irgendeine Notverordnung oder jeder Belagerungszustand, wird sich aus dem Folgenden ergeben" (ibid.).

force which decides on the *how* of this application,[75] and that force is the sovereign. Importantly, for Schmitt this means that laws are not the only thing there is to what he calls an "order in the juristic sense;" instead, there are legal norms and there is a concrete situation onto which these legal norms are or can be applied, but there are also times—and these times are times of exception—when the concrete situation does *not* make possible the application of norms. "Every general norm," Schmitt writes, "demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium" (ibid. 13). And sovereign is precisely he or she who decides on whether or not this "homogenous medium" can be said to be present. If it is not, then the legal order must be suspended, and when this happens the:

> decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation, as one would say. The two elements of the concept *legal order* are then dissolved into independent notions and thereby testify to their conceptual independence (ibid. 12).

For Schmitt, then, the decision is always superior to and represents a higher order than any legal norm since the application or non-application of the legal norm is essentially based on a decision as to whether the specific situation makes the application of a legal norm meaningful. The norm is in other words grounded in a decision, but the decision is not grounded in a norm, and this is the pivotal insight that Schmitt arrives at.

What Schmitt presents us with is therefore yet another version of law and its outside, but it is a version with significant differences from both Menke's and Foucault's liberal versions. In Schmitt's "decisionist" philosophy, the outside is indeed the concrete situation, but it is not a concrete situation of a liberal system in which this concreteness is beyond the purview and power of the sovereign. Instead, the sovereign is exactly he or she who has the power to neutralize this uncontrollable outside through the sovereign decision as to when laws must be suspended in a state of exception, and the split between legal norm and a higher, "juristic" order sets in which the sovereign must first again bring about a homogenous medium in which legal norms can come to make sense.

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75. "It is rooted in the character of the normative and is derived from the necessity of judging a concrete fact concretely even though what is given as a standard for the judgment is only a legal principle in its general universality. Thus a transformation takes place every time. That the legal idea cannot translate itself independently is evident from the fact that it says nothing about who should apply it" (ibid., 31).

At every moment the sovereign therefore must ask him- or herself the question of "whether the constitution needs to be suspended in its entirety" (ibid., 7), and the state of exception is the situation in which the answer to this question is a resounding *yes*; and when the constitution and the legal corpus derived from this constitution are suspended, things such as torture and summary incarceration without *habeas corpus* become possible.

Against Liberalism

This, then, is another imagination of how torture can occur during a grave threat to national security: through the suspension of law in a state of exception. In this framework, torture and other illegal emergency actions are not the choice of one random actor, as it often is in the ticking time bomb-scenario, but follows from the general suspension of the legal order; torture does not grow organically from beneath, so to speak, but as a necessity in order to restore a basic order, a "homogenous medium," in which legal norms can once again make sense.

We see therefore that it is, in essence, around the notion of *necessity* that both the ticking time bomb-scenario and the state of exception revolve, but what we also see is that the task of identifying when such a necessity is present changes locus dramatically from the one to the next: the liberal framework can only function to the extent that it is the *you* on the ground who decides on the exception; the state of exception in Schmitt's thinking is always the work of the sovereign who is the sovereign exactly because he has the power and the responsibility to ensure the homogenous medium of the state.

While the two models at a glance therefore seem to be cut from the same piece, at closer inspection they represent two quite different ways of thinking about exceptions due to how they envision the locus (and the onus) of exceptionality. In the Schmittian framework, the liberal idea(l) of an epistemological and normative split between the state and its outside is challenged by an epistemological and normative counter-claim: the sovereign is he or she who can decide on the exception, and the sovereign is he or she who *should* decide on the exception. The regulatory principle of law and its outside—which in the liberal framework is law's "self-reflection" as elaborated on by Menke—remains and must remain sovereignty itself for Schmitt, in the shape of he or she who decides on the exception (and, by inference, on the *non*-exceptional, i.e. a trivial situation where legal norms do have a homogenous medium to propagate in.) Yet, Schmitt acknowledges that precisely many modern and liberal constitutions do in fact muddy the concept of sovereignty:

> All tendencies of modern [liberal] constitutional development point toward eliminating the sovereign in this sense. Whether one has confidence and hope that it can be eliminated depends on philosophical, especially on philosophical-historical or metaphysical, convictions (ibid., 12).

These two sentences—sentences which shortly will become decisive for our analysis of the U.S. torture regime—are mysterious. What Schmitt essentially says is that his idea about the sovereign—and thus the sovereign as such—still prevails, but that there may come a time when the sovereign can be "eliminated," adding that whether or not this be the case is a matter of conviction ("philosophical-historical" or "metaphysical" convictions, even.) How are we to understand this?

We are arguably to understand it precisely as the sign that in Schmitt's analysis—which here is completely aligned with Foucault's—liberalism poses a basic challenge to ideas about sovereignty, but that Schmitt (who wrote his *Political Theology* during the worst crises of the newly wrought Weimar Republic) still cannot see a way in which the outside of liberalism has actually exorcised the ghost of sovereignty. Whether the ghost of sovereignty will one day finally be removed is not just a matter of pragmatic developments in the constitution-crafting business; for Schmitt, who never tried to hide the relation between his legal-political analysis and Catholic theology (the book we are mainly focused on here is, after all, called *Political Theology*), the idea that liberal constitution-makers should one day finally succeed in exorcising the ghost of the sovereign as the ordering principle of the state implied the idea of a take-over of the world by a total chaos of an outside of the law that cannot be brought to order by a sovereign. For Schmitt, in other words, the benign outside of liberalism is indeed a dark side which encroaches more and more on sovereignty, and as Giorgio Agamben has shown in his *The Kingdom and the Glory* (2011), "liberal democracy" is therefore that against "which he [Schmitt] wages his battle" (Agamben 2011, 73), not as a matter of simple political preference, but as a matter of political theology at its most literal: sovereignty and empire are the only elements of a secular polity that can keep the radical chaos of the outside at bay.

As Schmitt implies in a later work, *Nomos of the Earth* (1950), sovereignty and empire make up the ancient theological concept of a *katechon* (the "restrainer"), i.e. that which holds back the coming of the end of days and makes possible human history as such by opening a gap between the first and second coming of Christ in which this history can play out (Schmitt 2006, 59). The restraining function of the *katechon* within Catholic theology is therefore understood as a force which holds back the coming of the Anti-Christ, but thereby—and herein lies the fascinating paradox—also holds back the

second coming of Christ.[76] The sovereign as *katechon* holds back the apocalypse by holding back the forces of ultimate evil *and* the forces of ultimate good, and for that the sovereign is, in the words of Giorgio Agamben, the "power that, postponing the end of history, opens the space of secular politic" (Agamben 2011, 7).

It is therefore a typical misunderstanding to assume that Schmitt does not "care" whether or not we are in an exceptional situation, where norms do not apply, or in a normal situation where norms do apply, and that the only thing he is interested in is to supply legal philosophy with an alibi for sovereign (i.e. autocratic or even fascist) rule. The identification of the exception and the measures taken to eradicate this exception are exactly testimonies to Schmitt's political-theological fear of a future situation of total chaos in which laws finally will cease making sense for good due to the lifting of the *katechon.* Such a situation would precisely spell the end of the sovereign's function, since the meaning of the distinction between normalcy and exception would be lost and thus the decision between the two which remains the hallmark of the sovereign in Schmitt's framework.

While, as the previous chapter argued, the liberal framework does not conceive of a "dark side," the Schmittian framework definitely does, and the dark side of this framework is arguably *exactly* the outside of the law deemed benign by liberalism. If there were not a sovereign to keep this dark side at bay, or rather: when the notion of sovereignty has finally lost its meaning through the anarchy of liberalism, this dark side and the chaos it represents will spell the end of human history or, at least, of empire.

Schmitt's Worst Fears

While the formalization of the U.S. torture regime through the legal memos between the White House and the Office of Legal Council and the official set-up of an extralegal prison camp in Guantanamo Bay is obviously not congenial with the liberal haecceity of the ticking time bomb-scenario, it for many reasons seems apparent that the "decisionist" framework of Carl Schmitt is quite a bit closer to that expounded by the memos. All the elements of a Schmittian legal-political ontology thus appear to align with the version of the "unitary executive" that we saw Bush embody after 9/11: a call for a strong executive, disdain for the separation of powers, the claim that laws did not "apply" due to the exceptional nature of the situation etc. The seemingly flawless fit has also been noticed by many

76. As Walter Benjamin writes in *On the Concept of History*: "The Messiah comes not only as the redeemer; he comes as the victor over the Antichrist" (Benjamin 2006, 391).

scholars, who, by using a Schmittian framework, have argued that Bush attempted to "produce a situation in which the emergency becomes the rule, and the very distinction between peace and war . . . becomes impossible" (Agamben 2005, 22).[77]

Writing in a different genre, Thomas Powers also draws a strong link between the unitary executive and (Schmittian) virtues of sovereignty and empire when he argues that the ideas behind the widened executive prerogatives of the post-9/11 era had been dreamed about for a long time in the bowels of certain parts of the GOP:

> The change was already underway when the shock of the attacks on September 11 created something like a Dirty Harry moment—an abrupt end to patience, a breaking with civility, a rejection of pettifogging legality, a brushing aside of action in the use of force, all those Aunt Sally hesitations which Secretary of Defense Donald Rumsfeld intended to root out as part of the Pentagon's "old think." The goal was a kind of internal liberation of the national psyche—comfort with the word "imperial," unashamed acceptance of power, eagerness to put boots on the ground, plain talk with anybody who stood in our way, prompt action if they did not step aside (Powers, xv).

Again, we see what could be construed as Schmittian virtues at play; empire, power, prompt action – and even the "liberation of the national psyche," a phrase that strikes up eerie connotations to how the blatantly autocratic and racist rule of National Socialism also was perceived as a liberation movement in the early nineteen-thirties by its "reconstructing" (and re-militarization) of Germany. Everything therefore seems to point to the fact that 9/11 offered the opportunity to actualize a modern version of a Schmittian "decisionist" philosophy under the guise of what had until then only been the "obscure" dream of a few idiosyncratic voices in the White House: the philosophy and the actualization of a "unitary executive."

However, if the general gist of the unitary executive theory is congenial with a Schmittian "decionist" viewpoint—which it seems quite reasonable to argue—something happened with this philosophy after the events of 9/11 which makes using it as an explanatory framework for the U.S. torture regime a questionable endeavor. In the Schmittian framework, the sovereign has the "authority to suspend valid law" (Schmitt 2005, 9) and "what characterizes an exception" is therefore "unlimited

77. See also the aforementioned articles by Thomas P. Crooker and Sanford Levinson

authority, which means the suspension of the entire existing order" (ibid., 12). Such a decision is based on the sovereign's identification of an "extreme emergency and of how it is to be eliminated" (ibid., 7).

The inherent connection between the facts of the emergency and the facts of eliminating this emergency, then, is a *decisive* aspect of Schmitt's ideas about the state of exception (an aspect that becomes a lot clearer in the German original where Schmitt is able to make a modulation from "Notfall" (emergency) to "Notwendig" (necessary)).[78] There is in principle no identification of the exception without an identification of how to remedy this exception and restore normalcy. The power of the sovereign is assumed precisely to be a power that exceeds laws *because* it has the power to create a lawful situation; a situation of dire necessity finds its solution in the necessarily unlimited powers of the sovereign ("inhalt der Kompetenz sind hier *notwendig* [my emphasis] unbegrenzt" (ibid., 14)), but if these unlimited powers of the sovereign do not include the power to "eliminate" the exception, the whole Schmittian matrix breaks down – or, rather, the state as such breaks down into the complete chaos of precisely a dark side.

When we compare what we know so far about the bipolar world of the memos and the dark side with what we know about the philosophy of the "unitary executive" and its connections to a Schmittian "decisionist" legal-political philosophy, it therefore becomes clear that the former in decisive ways do not conform to the latter.

First, we remember that the legal memos *do not use necessity as their basic argument*. The memos clearly discard the use of necessity defenses and claim instead that law as such simply does not *apply* to the "dark side" opened up by the terrorists, and that for this reason there is no need for a necessity defense. The avenue for extralegal measures that the "Notfall" in the Schmittian framework opens up for is suggested multiple times by Bush's lawyers, but in the end it is also deliberately not the path chosen; there is no "necessity" that demands a suspension of laws, only a dark side of the world to which laws *as such do not apply*. This deliberate choice of not appealing to necessity not only places the Bush Administration's legal memos outside of a Schmittian framework, it also makes impossible any appeal to the adage of *necessitas non habet legem*[79] or to the idea that the "Constitution is not a

78. "[W]enn es sich wirklich um den extremen Notfall . . . handelt. Voraussetzung wie Inhalt der Kompetenz sind hier Notwendig unbegrenzt" (Schmitt 2009, 14).

79. A maxim which according to the Oxford Guide to Latin in International Law means "that the violation of law may be excused by necessity" (192). Significantly, and as the guide also expresses, *necessitas non habet legem* is "not a rule of general application in international law, but it may be applied in some exceptional cases for reasons of equity" (ibid.).

suicide pact."[80] The dark side is *not* a single case of extreme necessity (a "Notfall") identified by the executive-as-sovereign; it is a constitutive part of the bipolar world of the legal memos.

Second, but closely connected to the first point, is the fact that the dark side—and thus the whole bipolarity—is not a temporary phenomenon in the memos. The dark side where law does not apply has no expiration date, it is as permanent as the state and the law outside of which it lies. This means that the ratio between normalcy and exception (where periods of exceptions must necessarily be far fewer than those of normalcy to deserve their name) is dissolved into a permanent light side and a permanent dark side. If it ever makes sense to talk about a "permanent State of Exception" (Agamben, 12) or a "permanent emergency," (Levinson, 16) it most definitely does not within a Schmittian framework; any such claim would imply a complete breakdown of the Schmittian system since it marks the point where the "elimination" of exception has not been successful and thus the point where the sovereign has become an impotent sovereign. A permanent dark side is not within the range of desirable outcomes for Carl Schmitt.

Third, what we identified in the memos as a notion of knowledge which was not centered on any specific piece of "actionable" intelligence, but on general information about what appears as a completely chaotic world of grave threats around every corner does not conform with Schmitt's idea that even in the exception order exists.[81] A situation in which knowledge has no criteria (or so many criteria that they end up discriminating between nothing) and where it is impossible to even know what you are looking for, a situation defined by a completely unmarked and open-ended notion of information does not imply that order—even if it is not a legal order—exists. Instead, it marks a whole new situation where the dark side of the bipolarity is nothing but immense chaos. This, again, can be construed as a Schmittian concept (Schmitt uses the word chaos again and again as a sort of chorus for what he fears or hates the most,) but it is a concept against everything in Schmitt's model is set up to avert: chaos really is apocalyptic for Schmitt.

Fourth, the fact that U.S. Constitution, legislation and legal system is kept fully in force—with all its protections and its "truth-finding function"—in one part of the world, while another part of the world categorically has *no* present or future relation to any of these things opens up for a dramatically

80. Expressed by Justice Arthur Goldberg in 1963 as an echo of an earlier, 1949 statement by Justice Robert Jackson (Posner, V).

81. "Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind" (Schmitt 2005, 12).

different situation than "suspending the constitution in its entirety," as Schmitt holds that the sovereign can do in a state of exception. Again, we have to realize that these deviations from the Schmittian schema were not made at random; when discussing the legal work of his predecessor in the Office of Legal Counsel, Jack Goldsmith told David Addington and Alberto Gonzales that "[t]he President can also ignore the law and act extralegally," and that "there were honorable precedents . . . of defying legal restrictions in time of crisis" (Goldsmith, 80).[82] But Addington and Gonzales wanted none of it; the century year old (and Schmittian) idea of acting extralegally in times of crisis (which was done by famous presidents such as Lincoln and Roosevelt, in both cases during crises of even larger scopes than the one following 9/11)[83] was not the idea they had in mind. They wanted something new which did not *also* include the century old idea that when the executive did act extralegally, such action went hand in hand with the leader "throwing himself on the mercy of Congress and the people so that they could decide whether the emergency was severe enough to warrant extralegal action" (ibid.81). This, then, was no "ordinary" emergency situation or State of Exception in which all bets were off for a short while and after which normalcy and accountability would ensue; this was a permanently new world, or rather *two* new worlds, the light side and the dark side.

A Unitary Sovereign?

The challenges that meet us, then, when we try analyze the memos and rhetoric of the Bush Administration and the torture regime that followed is that they do indeed contain strong elements of a "decisionist" philosophy in the vein of Carl Schmitt, but that they also contain something of a completely different nature which cannot be accounted for by this train of thought. Were these dramatic deviations from a classic, conservative, Schmittian "decisionism" a part of the plan, so to speak? That is of course impossible to say, and we are indeed uninterested in trying to explain "psychologically" why a handful of powerful men suddenly found that torture was a completely acceptable thing. What we can say, based on the early history of the Bush Administration, is that things did not turn out as planned for the "unitary executive" (who conceptually had been in the making long before 9/11), and

82. Thomas Jefferson thus wrote: "The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property, and all those who are enjoying them with us; thus absurdly sacrificing the end to the means" (Goldsmith, 80).

83. Here we also see the link between Roman law and the American system, as Andreas Kalyvas mentions that Hannah Arendt identified: [F]or Arendt, the American Revolution was closer to the Roman tradition and the republican legacy than to the Judeo-Christian heritage" (Kalyvas, 225-226).

that this may be part of the key to understanding why the administration ended up with the policies they did.

In fact, the Bush administration had not only not seen 9/11 coming; the administration's anti-terror policy marked a significant deviation from that of President Clinton who appears to have become increasingly aware of the threat posed by Al Qaeda in the last years of his tenure, encouraged by the 1998 Al Qaeda attacks on the U.S. embassies in Nairobi and Dar es Salaam and the 2000 USS *Cole* bombing. Yet, it turned out to be well-nigh impossible to convince the newly elected President Bush and other key members of his Administration that the organization posed a real threat which had to be acted against, better today than tomorrow. An anecdote related by Ron Suskind tells that after a CIA briefer in the summer of 2001 had tried to convince Bush to do something about the mounting Al Qaeda threat, Bush had answered by saying "All right. You've covered you ass now" (Suskind, 7), indicating that the president considered the CIA's focus on Al Qaeda to be more foolish than prudent.

But if Al Qaeda was not the focus of the new administration's national security policy, what was? As it turns out, the administration spent its energy on righting what Cheney, Rumsfeld and others considered a historical wrong—a historical wrong which was precisely tied to the erosion of the presidency since the seventies—namely the anti-ballistic missile system, popularly known as the "Star Wars"-project which would once and for all put the policy of "detente" into its long overdue grave (Powers, 44). So the "unitary executive" spent his time and money on a defensive system which, for all its apparent futurism, was an idea or an affective relic or even nothing but a grudge from a Cold War that had long been over.

Only a week before the attacks on September 11, Richard Clarke and CIA director George Tenet did finally manage to reach the highest echelons of the Administration and push them into realizing that something had to be done. By then, of course, it was too late. The ball was rolling towards forcibly waking up the US and the world to a whole new reality or a whole new nightmare, where threats did indeed come from the sky, but in a shape that no one in the highest rungs of the Administration had expected and against which no missile defense system would protect the nation.

The situation, then, went from an assertion of U.S. hegemony in a post-Cold War world by making America bulletproof against intercontinental nuclear missiles to a horrific demonstration of the radical penetrability of mainland U.S. on September 11.While the general population naturally was in shock and grief, members of the administration not only had to cope with these feelings (which probably were common to all Americans, whether White House officials or not), but also with the fact that its dreams of all-powerful unitary executive was over-matched by a threat that no one had seen (or

had wanted to see) coming. Could it be that between the decade old dream of a unitary executive and the shocking reality of 9/11, something snapped? And that the bipolar world of the memos and the torture that it led to was the result of this snap?

Radical Split

Whichever was the road to the bipolar world and its dark side, we know how it ended: a light side where normalcy went on with its normal business, and a dark side in which everyone and everything could potentially pose an existential threat to the U.S. and where immense amounts of information were retrieved according to no other criteria than that of quantity.[84] The legal-political ontology drawn up by the three memos represents a world that precisely corresponds to these two contrasting and paradoxical paradigms, not by resolving them into a synthesis or a compromise, but by spawning to wholly different worlds that work according to two completely incommensurable legal, political, and epistemological standards: a world of radical goodness tied to the immutable qualities of American law and power, and a world in which chaos reigns and where the only value is that of ever growing amounts of information.[85] The memos therefore draw up a map of a world striated by two heterogenous and mutually exclusive ontologies of power and law: a light and a dark side.

Because of the heterogeneity of the two parts of this bipolar world, one part never has to account or be held responsible by the other, since, strictly speaking, neither part *can* ever account for the other. In one world, American values such as individual freedom and the rule of law can be upheld as a stronger narrative than ever, while, simultaneously, the administration all but admits that it has systematized torture as a way of mapping the other world – the chaotic world, the paranoid world.

In breaking with—or *because* it breaks with—the Schmittian notion of a sovereign, something remarkable also happens to the idea of the "unitary executive:" it changes character. In the original meaning of the term, it denoted the one executive's total power over the whole (i.e. the "unitary") executive branch. In the bipolar world, the unitary executive is unitary because it unites two radically different and incommensurable principles, the side of law and the dark side outside law. This, in turn,

84. By writing so, I am not blind to the fact that the administration's anti-terror policies also represented serious encroachments upon the rights and liberties of U.S. citizens; as we shall see in the second part of the dissertation, it was in the very nature of the dark side to spread to still more zones and areas.

85. Whenever we find ourselves talking about such a split we naturally come to think of the concept of trauma which typically also denotes a split that which can be appropriated with language and that which cannot. But while trauma normally works by way of negation (there are things that cannot be said or integrated into our experiences), trauma here is productive; the traumatic split creates two dramatically different worlds.

has consequences for the notion of sovereignty as such, for any idea of the sovereign as one person or authority who guarantees the "homogenous medium" of the law must necessarily be abandoned too.[86]

Instead, sovereignty must be split in to two the same way that the world has been, thereby not really remaining sovereignty in any meaningful sense of the word. This particular act has been caught brilliantly by Maggie Nelson in her book *The Art of Cruelty* (2011), where she astutely identifies sovereignty in the age of a bipolar world the following way:

> The Bush/Cheney dyad of denial/justification represents two sides of a single coin: Bush spoke the voice of delusion (it never happened, it will never happen); Cheney, the voice of justification (we had to do it, we should still be doing it) (Nelson, 42).

The voice of delusion, then, is the voice representing the values of the United States, the voice of a person who has everything under control; it is the voice of the light side. Conversely, the voice of justification is the voice of paranoia which speaks about the need to let the "gloves come off;" it is the voice of the dark side. And just as Bush and Cheney were part of the same administration, these two voices belong to the same bipolar world, a world cut in half.

From being a concept of unity-in-oneness, the unitary executive becomes a concept of union-in-incommensurable-duality: a new Janus Head which does not preside over beginnings and ends as this solely Roman mythological invention did; a new Janus Head whose temple is not closed "during times of peace" (Dixon-Kennedy, 179) as the original was and as the Janus Head of the Schmittian sovereign arguably is; a new Janus Head where the two faces and the two gazes rule over each their side of the bipolar world. President Bush and Vice President Cheney:[87] rulers of the light side and the dark side, respectively.

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86. In a different context, Gregoire Chamayou has also questioned Giorgo Agamben's reading of Schmitt on the exact same point; Agamben connects the figure of the "outlaw" to the State of exception and sovereign power, while Chamayou sees the outlaw precisely as a trope that challenges the power of the sovereign: "Banishment, then, appears as the sign of a weak power that is incapable of catching a fugitive, a step taken in the absence of the offender, an expedient of power confronted by subjects who escape it" (Chamayou, 27).

87. "The most powerful vice president in American history, Cheney literally called the shots for the administration on 9/11. He did not hesitate to take command, and Bush acquiesced to his vice president's actions. As the war on terrorism unfolded, Cheney would continue to play a central role in guiding Bush's policies" (Savage, 7).

True Apocalypse

There is, as far as I am aware, no theoretical conceptualization of such a way of organizing a state; with the conceptual tools available to us so far we can only say together with Schmitt that such a Janus Head seems to represent a world where complete chaos has been allowed to constitute a fully-fledged dark side. We are, however, also wary about only using a Schmittian eschatological-theological viewpoint to enlighten and criticize the bipolar world, seeing as we cannot accept that sovereignty and empire in their function as "katechon" should be the only way to conceptualize its problems. In his *Multitude – Between Innovation and Negation* (2008), Italian philosopher Paolo Virno suggests a way to dislodge the concept of the *katechon* from its "unambiguous attribution to sovereignty"(Virno, 58) in Schmitt, and we will follow his attempts in order to take a critical stance towards the bipolar world without having to subscribe to Schmitt's authoritarian political theology as its solution.

Virno's recuperation of the *katechon* starts out by also turning towards the apocalypse, specifically what he calls "cultural apocalypses," a term which already dislodges the *katechon* from its religious-eschatological iteration in Schmitt's thinking. A cultural apocalypse is a moment of crisis defined by two radically heterogenous movements: a "defect of semanticity" and an "excess of semanticity." The "defect of semanticity" is the idea of a language that has lost any ability to define and order the world. It is a situation in which authority and the language of authority still exists as a concept, but where the power and ability to actually organize and govern the world has been lost. Virno thus defines it as a situation characterized by "stereotyped behaviors" and "regulation without regularity," a sort of absurd repetition of the gestures of power without actual power.[88]

Alongside and opposed to this "defect of semanticity" is a situation of "excess of semanticity," i.e. a chaotic world that has fallen into a "state of shapeless potentiality" whose "fundamental elements, still far from constituting discrete unities, are, rather, based upon an unstable and contained continuum" (ibid., 53). This chaotic world runs according to its own, uncontrollable dynamics and regularities onto which language and no power can impose order; it is a state of "regularity without regulation."

According to Virno, these two phenomena constitute the two poles of the cultural apocalypse, not because language normally functions flawlessly as an ordering principle of the world or because the world normally does not have quite a few drops of chaos in it. The apocalyptic element of the cultural

88. Virno also describes this as the "compulsory repetition of the same formulas and gestures prevails; the world dries up and is simplified to the point of resembling a papier-mâche backdrop" (Virno, 53)

apocalypse resides in the fact that the constant adjustment and oscillation between language and world has stopped, and has been substituted for a radical polarity.

For Virno, the two poles of the "cultural apocalypse" also represent two different temporal matrices:

> The cultural apocalypses illustrate the anthropogenic threshold in which it is difficult to trace a clear distinction between 'never again' and 'not yet' . . . Those who find themselves living a cultural apocalypse are made to experience the 'defect of semanticity,' together with the stereotyped actions and signal-phrases that accompany this defect; they are made to experience, equally, the mirror 'excess of semanticity' that cannot be resolved in precise terms,' together with the consequent predominance of shapeless potentiality (ibid., 54).

So the "stereotype behavior" of the "defect of semanticity" —i.e. the language which has lost any ability or power to regulate the world—is defined by a "never again;" and the "shapeless potentiality" of the chaotic world is defined by a "not yet." These elements of Virno's cultural apocalypse seem familiar to us, and they are: Virno's description of a "cultural apocalypse" corresponds to Nelson's description of the dynamics of the "Bush/Cheney dyad" where the former also exclaimed "it will never happen" and the latter "we had to do it, we should still be doing it."

Does Virno's theory of the "cultural apocalypse," then, not precisely describe what happened in the bipolar, post-9/11 world where sovereignty, according to Maggie Nelson, was split into the "Bush/Cheney dyad of denial [and] justification?" Could we not precisely call the relentless onslaught of raw information in the months after 9/11an intrusion of a dark side of "shapeless potentiality" which "far from constituting discrete unities" was in fact "an unstable and contained continuum" of raw, paranoia-inducing intelligence?

The connections between Virno's semiotic analysis and Nelson's reenactment of the Bush/Cheney dyad seem inescapable, and taken together they make us realize that the Administration's bipolar world where the empty, lingual gestures of law defined a light side and the total chaos of a categorically lawless zone defined the dark side was *essentially apocalyptic*.

But how is this apocalyptic situation different from a "normal" situation? How does it refer to the Schmittian distinction between exception and normalcy? How is it resolved? It is clear from Virno's argument that we always live in the shadow and with the threat of coming cultural apocalypses, i.e. with the threat of language losing its descriptive and proscriptive force *vis à vis* the world. As opposed

to Schmitt, however, Virno does not find his solution to this threat in a strong sovereign who guarantees order as the *katechon* of empire; for Virno language *itself* is *katechon* due to its ability to hold the radical polarity of the apocalypse at bay through its ability to transcend itself and perform a constant negotiation between the regulating rules of language and the chaotic, regular flows of the world outside language. With this idea we are back to Cristoph Menke's notion of law's self-reflection as a basis of a democratic polity: the death of democracy through the destruction of law's self-reflection and Virno's idea about language's function as *katechon* through its ability to transcend itself are juridical and semiotic perspectives on the same basic democratic condition.[89]

Based on this and the preceding chapter we are now also able to draw up a more comprehensive overview of the bipolar world of the Bush Administration and the legal memos: It is a world with an outside, but it is not a conditioned, benign and liberal outside of rights and utility where torture is sometimes imagined to be a last resort; it is an outside of complete chaos, a dark side. Nor is it a Schmittian world where the sovereign is one figure who can choose to act extralegally and torture due to a presumed "necessity;" it is a world where sovereignty has been split into two, one for the light side and one for the dark side. It is a world where law categorically only exists and makes sense on the one side, while on the other law is so meaningless a concept that it does not even warrant suspension in the name of necessity; a world where the regulatory force of legal and political language has given up on making sense of the dark side. And, finally, it is a world in which the hope of ever reconciling the two poles seems to have been abandoned. It is, in short, an apocalyptic world and a bipolar world – or it is an apocalyptic world because it is a bipolar world. Now it is time to try to find out exactly where torture fits into *this* scheme.

89. Menke has also theorized about this transcendent movement beyond the law and as a basic element of modern societies; at this even larger scale he leaves the notion of "law's self-reflection" behind and instead uses the word "ritual" to denote a societal praxis of reaching beyond itself and into something that very much resembles Virno's "shapeless potentiality:" "Denn Rituale sind diejenigen Praktiken einer Kultur, in denen diese ihre Etablierung in sich wiederholt, indem sie sich der Konfrontation mit ihrem Anderen, der *ungeformten, nichtartikulierten und nichtgeordneten* Natur aussetzt" (Menke 2015, 132, emphasis added).

dark arts

CHAPTER FIVE:

ENDLESS INFORMATION

Don't feel sorry for me. Feel
sorry for the ones who did this
Chris Mackey

Let us take a moment to think back on the eponymous photo of George W. Bush the second he learns that the jets had crashed into the Twin Towers. Sitting in a classroom somewhere in Florida, his Chief of Staff bows down and whispers the news to him, while Bush stares in a downward angle at something beyond the frame of the photo. The severity of the moment is contrasted by the usual bric-a-brac of elementary school classrooms: On a shelf to his right stands a small rectangular box that reads "Flashcards" and behind him is a tiny blackboard with the handwritten words "Reading Makes a Country Great!" in a comic-sans like font. Embodying the optimistic, if often false promises of social mobility via education, the flashcards and the blackboard also speak into the more particular context of a president who—justified or not—had on several occasions been accused of lacking even the most elementary knowledge about the world.[90] More than anything though, both the stuff in the background and the contours of the handful of pupils sitting in the foreground seem to disappear around Bush's face and its expression of confusion and disbelief. It is, in short, almost impossible not to stare at Bush.

If we, however, force our gaze away from him for a moment we notice that there is also something about postures and angular momentum in the photo; the face of Andy Card, Bush's Chief of

90. Famously, when still a candidate for the presidency, Bush was given a pop quiz on foreign affairs by a journalist which he failed horribly. The Washington Post reported that: Republican presidential front-runner sat down Wednesday with WHDH-TV, the NBC affiliate in Boston, and was asked to name the leaders of four current world hot spots: Chechnya, Taiwan, India and Pakistan. He was able to give a partial response to just one: Taiwan. The Washington Post. "Bush Fails Quiz on Foreign Affairs." November 4, 1999. http://www.washingtonpost.com/wp-srv/aponline/19991104/aponline181051_000.htm

Staff who conveys the message, is hidden behind Bush's head, and the angle of his body almost makes it look as if he is not so much whispering something into the President's ear as he is leaning his whole body onto Bush in a gesture of extreme fatigue or maybe even sorrow. We also notice that the children are facing Bush too, not with the same visceral intensity as Andy Card, but with the skeptical disinterestedness of the eight to ten year old who might be thrilled at meeting the president, but who also look forward to the next break.

Everything in the picture seems to look and lean towards Bush, and if we return to him again, we cannot help to notice the obvious: this is not the image of a "unitary executive" who cannot wait to go at it himself in a US dominated post-Cold War world. This is the face of a man in momentary free fall. In fact, Bush seems to almost be the physical incarnation of the performance artist known by the name of "Falling Man" from Don DeLillo's 2007 novel by the same name: "A man was dangling there, above the street, upside down. He wore a business suit, one leg bent up, arms at his sides" (DeLillo, 33). Yet, Bush was not just not a unitary executive because he did not look or act like one; he was also not a unitary executive because the world had been sliced into two, becoming an apocalyptic, bipolar world, a world with two incommensurable spheres over which no one executive could have the power of executing.

At the present point of our analysis, we are tempted to conclude that the radical compartmentalization of the world would forever be defined by a dichotomy where there is a world of law and an outside that is nothing but this law's pure negation; a bipolar world where perhaps we could say that the two poles have the value of one and zero, respectively. It is however clear that such an analysis cannot satisfy us since we know that United States did intervene in the dark side, that U.S. forces did invade Afghanistan and Iraq, and that U.S. agents and soldiers did abuse and torture hundreds if not thousands of people, and that some sort of order was created, even if it were not a legal one.

Fortunately, Maggie Nelson's description of the "Bush/Cheney-dyad" helped us begin to realize that the dark side was not just pure negation or a discursive or ontological void, but a side that could potentially be ascribed its own positive vocabulary.[91] The first element of this positive vocabulary was Dick Cheney himself, the man who had or the man who took the right to name the dark side (we could even call him the *patriarch* of the dark side), and the man who, at the moment of this naming ritual, said that this dark side was one "we" had to "work." Cheney, then, was the first "positive" element of

91. I use the term "positive" in the sense employed by Michel Foucault in his *Archeology of Knowledge* – as something, that is, which has a real, material existence, as opposed to something that does not.

the dark side, the first mover, the patriarch, or perhaps (and we suspect that this would be Carl Schmitt's analysis) the first revolutionary in a *coup d´etat* which brought down the unitary executive.

We should also add that it is not strange that Cheney would be the man to conceive of this apocalyptic polarization; fifteen years earlier, he and Rumsfeld had partaken in a secret "continuity of government program" under the Reagan Administration, where from time to time they would suddenly be whisked away to a secret underground facility as part of exercising for a future nuclear holocaust. It is not strange either, that Cheney (and Rumsfeld) would not care too much about the Constitution or U.S. law in light of grave crises; these continuity of government exercises were apparently set up in ways "never envisioned by the Constitution or federal law" (Mann 142-45).

So Cheney was the man who introduced the dark side, and Cheney is probably the person whose name will always be connected to it, and justifiably so. However, the relation between Cheney and the dark side was not only the relation between an inventor and his invention; it was in fact more like the relation between discoverer and a territory he has discovered which he must begin to map, act, and live in.

In the first part of this dissertation we attempted—based on legal memos from the Office of Legal Counsel to the White House—to document the making of the dark side and to contrast it with other common ideas about the outside of law in times of emergencies. This documentation mostly related to the overall bipolar structure and barely to the question of torture itself; it may even seem that we have neglected for too long to specifically delve into the torture that followed.

That we only now arrive at torture proper, however, is predicated on the fact that it took some time for the legal memos to arrive there themselves; first, the dark side had to be established as a concept and as a space, and only afterwards could this space be filled up. We could say that the first three memos we looked at were *destructive* due to how they tore loose a part of the world from language and law, thus making it into a dark side; from now on, the texts we will look at are *constructive* because they start filling up this dark side with techniques and objectives proper to it.

Following the path of this construction we will see that there were things that could be done on the dark side, ways of seeing, knowing and acting which were radically different from normal ways of seeing, knowing and acting, but ways which correlated perfectly with the specific qualities of this space. In this chapter we will look closer at how the dark side not only received a name, but also a highly specific epistemological and organizational principle: that of *information.*

The Value of Information

We know that "working" the dark side means to act in a world of a permanent, apocalyptic chaos where no terms of law or language have any meaning. We have also seen how an endless river of raw "intelligence" changed fundamentally the ways in which information as a resource was procured, valued, and used in the early days after 9/11, a development which made key actors in the White House "paranoid" (Cheney) and "sensory overloaded" (Baker). Each nugget of information thus represented a threat to the United States, threats that were not rated or organized according to any principles, and these nuggets would only keep on streaming in according to the logic of Bybee's "etc."

It stands to reason that an intelligence operation relies on information to do its job, and—as we know from Richard Clarke—the task of any intelligence operation is not only indiscriminately to acquire tons of information, but to sort through this information in order to ascertain with as much accuracy as possible which bits are relevant and which are not. An intelligence operation, to use Paolo Virno's terms, has to impose some sort of regulation on the incessant, yet regular onslaught of information. Without such qualified gatekeeping, the intelligence effort remains unproductive and even becomes counterproductive.[92]

What was so unique about the post-9/11 predicament was precisely that the intelligence operation skipped this vital step of sorting various reports; everything was gathered, and everything was passed on to those at the top level who had to make the calls as to how to proceed. It truly was a situation with "regularity without regulation," which produced—as Virno foresees—in Cheney, Rumsfeld and Bush a situation of "excess of semanticity" where nothing was important because everything was important. The new type of intelligence gathering in the early days after 9/11 era were therefore an exact epistemological correlate to the greater idea about the dark side; no rules or language to organize it, no truths to pin it down, no voices to speak from it, only pure shapeless potentiality.

We need to be very careful here in order to understand properly the consequences of such a shift, not only for the development of "paranoia," but also for the development of a new idea of

92. This was especially clear with the NSA surveillance program: "citing anonymous FBI officials, the *Times* claimed that the NSA flooded the bureau with "thousands" of names per month to check out for possible terrorist connections. Far from being a "vital tool," as described by President Bush, the program was a distracting time waster that sent harried FBI agents down an endless seris of blind alleys chasing will-o'-the-wisp terrorists who turned out to be schoolteachers" (Powers 2008, 94). Patrick Radden Keefe aptly calls the effect of such massive amounts of information "constipative" (Keefe, 110).

knowledge and even more importantly a new idea about the value of knowledge. When there are no informational gatekeepers tasked with sorting the chaff from the wheat, there are also no qualitative criteria according to which a limited, but highly significant amount of information can be extracted and acted upon. And when there are no qualitative criteria according to which information can be sorted, refined, and corroborated, there is really only one way left to put a value on information, and that is by doing so *quantitatively*: more information is categorically always better than less information, notwithstanding the quality and character of this information.

When this becomes the case, the most important aspect of any piece of information is that it, in turn, can lead to more information. Information that closes in on itself and yields nothing but its actual content is as barren as a capital investment that does not produce interest, and the only worthwhile investments are those that yield funds that can be refunneled into further investment and make the great capital apparatus grow according, again, to a purely quantitative logic. That information valued only through quantitative criteria did indeed represent a break with earlier ways of doing intelligence work, as is also noticed by Thomas Powers:

> Modern eavesdropping seldom mirrors the classic wiretap of yesteryear when FBI agents with earphones might record hundreds of hours of a Mafia chief chatting with his underboss in New York's Little Italy. The idea now is to see if *anyone* on the phone in New York or New Jersey sounds in any way like a Mafia chief. A dinner of linguine with clams in a known Mafia hangout could be enough to warrant a further look. The al-Qaeda phone book numbers were the crack in the door; follow-up targets are simply numbers or e-mail addresses, leading to other numbers and e-mail addresses, all plucked from the torrents of traffic transmitted by the switching systems of the major American telecommunications companies (Powers 2008, 88, emphasis in original).

What Powers describes here is the outline of a whole new logic of information, or, to put it more formally, the outline of a whole new epistemology. This epistemology is what Joseph Margulies dubs the “mosaic theory” of intelligence (Margulies, 23) in which every piece of information is not only made to fit into the analysis of one single, definable threat as we met it in the ticking time bomb-scenario, but perpetually extends the mosaic by creating still more points of attachment and lines of intersection for future information. What we are dealing with in the mosaic theory is essentially a reverse fractal structure, a constant opening of new threats and new intelligence which—to borrow a

term from Jacques Derrida—makes the basic workings of the intelligence archive *anarchivic* through an endless repetition of addition, correlation, and expansion which never amounts to anything but greater amounts of information.

Such an approach to information gathering as pure accumulation is usually most strongly connected to the NSA surveillance regime which, as Edward Snowden tells us in *Citizen Four*, had its own term for the mosaic approach, namely linkability (which, along with the NSA's nickname "Puzzle Palace" points exactly to a sort of mosaic.) But we should not be fooled: the mosaic approach and the new epistemology of information for which it stood was not exclusive to so-called "signals intelligence." It was also the cornerstone of human intelligence exploitation, indefinite detentions, and torture. Joseph Margulies, who had first-hand experience with the U.S. torture regime as a lawyer, thus observes that:

> "[i]n theory, constructing this "mosaic" authorizes indefinite detentions, since it depends on both retrospective and prospective approaches to intelligence. One can never know in advance just how much time a particular investigation will require . . . While it may seem to the unitiated that the prisoner know only "innocuous" facts, the true import of his information may become known only once the military has the opportunity to reinterrogate him based on information learned other prisoners, *including prisoners who have not yet been captured* (Margulies, 24-27, emphasis in original).

What Margulies' observation tells us is that the new concept of information brought with it a distinct open-ended temporality based on, in the words of Virno, the "shapeless potentiality" of the dark side. Even the seemingly most inconspicuous bits of information could, when combined with other seemingly inconspicuous bits, point to something important or to new bits and pieces which could be added to this gargantuan intelligence mosaic.

The dark side, then, becomes a purely quantitative space and working the dark side becomes a matter of procuring more and more information according to no other standard than quantity and no internal or external temporal limitation. Such an epistemology is not just an academic matter, and it is immediately clear from Margulies' quote that the consequences for both present and future detainees were grave; or perhaps we should go so far as to say that present and future detainees melted together and became one and the same, since any present detainee would be held indefinitely because his "intelligence value" just might change dramatically with the intake of yet more detainees.

We have already hinted at the similarities between the informational paradigm and the incessant investment and reinvestment of capital, and what becomes clear now is that the underlying logic of such a shift towards strict quantitative valorization of information is one we know very well: it is the logic of the concept of money. A given amount of money, even less a specific bill or coin, has no inherent value, but only a quantitative, relative value, and any sane person would always swap a lesser sum of money for a greater sum of money. This innately quantitative determination of money's value is more than just an economic question; money is (to use a term from Marx) a "real abstraction,"[93] an epistemology, a basic way of seeing and organizing the world which can be applied to all sectors of knowledge:

> Before thought could arrive at the idea of a purely quantitative determination, a sine qua non of the modern science of nature, pure quantity was already at work in money, that commodity which renders possible the commensurability of the value of all other commodities notwithstanding their particular qualitative determination (Zizek 2008, 11).

Here, Zizek makes a decisive link between the quantitative determination of money and the development of a greater epistemological predicament, specifically the "modern science of nature." Let us keep this important connection between "quantitative determination" and science in mind, while for now focusing on the matter at hand: the epistemology of information shared fundamental and highly important structural traits with the idea of quantitative determination that is so vital to any monetary system. Another telltale sign of the shared logic behind money and information is that both belong to that exceedingly small category of words that cannot be pluralized: you can only own money and information, not moneys and informations – phenomena that, in spite of their strict grammatical singular, are always perceived and used as markers of an abstract quantity larger than one. Information, as money, is always moving towards an abstract "more," spreading uncontrollably as still more pieces are added to the mosaic:

93. As Paolo Virno writes in an earlier work: "Marx attributes to thought an exterior character, a public disposition, on two different occasions. Above all, when he makes use of the expression "real abstraction," which is a very beautiful expression also from a philosophical point of view, and then, when he discusses "*general intellect*." Money, for instance, is a real abstraction. Money, in fact, embodies, makes real, one of the cardinal principles of human thought: the idea of equivalency" (Virno 2004, 64),

> If the first generation of targets numbered a hundred, let's say, and each of them had been talking to a hundred people in a second generation of targets, then even a third-generation search could easily sweep up a million people (Powers 2008, 89).

The above quote is about signals intelligence, but the logic it showcases arguably started with the U.S. torture regime's approach to interrogation work and intelligence, where more information was always better than less information, disregarding its actual use-value or reliability. That information in the new epistemology functions a lot like capital is the first indication that the U.S. torture regime and its bipolar world had a greater affinity to the logic of modern global-neoliberal capital than is usually acknowledged, a point we will return to at length later. First, we will dig into one of the most notorious cases of torture and see how in practice paradigm of information came to define both an epistemology and a language; we will, shortly, see how and with what motives one "works" the dark side.

Miller Goes to Abu Ghraib

On August 31, 2003, Army General Geoffrey D. Miller went on a mission across the Atlantic (Danner, 275). The general was already deeply involved in the U.S. torture regime; from November 2002 he had been in command of Joint Task Force Guantanamo, the unit that ran the American prisons on the Cuban base, having replaced the former leader of the prison who was considered too soft on the detainees.

Miller was one of the men most responsible for the atrocities at Guantanamo, but on this particular day he was on his way to another island in the U.S. prison archipelago – Abu Ghraib prison in Iraq. Miller arrived a day after Donald Rumsfeld had visited the prison to have press photos taken with the soldiers (Karpinski, 196)[94] and it was probably on the behest of Rumsfeld or another high-ranking Pentagon official than he left the shores of Cuba for the desert of Iraq.

Miller, in his own words, came to the prison in order to "[e]nergize the analysis-collection feedback loop of the intelligence cycle with robust, timely, GWOT oriented, collection management planning and execution" (Danner, 207). While we do of course understand from this sentence that Miller went to Abu Ghraib to change the interrogation routines in order to get more information out of the detainees (we may have to read it twice, though,) the language sounds, quite frankly, more as an

94. One cannot help but wonder if somewhere in the deepest recesses of the pentagon a photo with Charles Graner and Donald Rumsfeld or Lindy England and Donald Rumsfeld exists.

insane parody of post-Fordist, soft labour managerial platitudes than an actual and useful mission statement.

Miller does not ask the soldiers at Abu Ghraib to investigate a specific threat. He asks them to collect information that is "oriented" towards the GWOT (Global War On Terror,) a criteria that is so broad that it is hardly a criteria at all. The language in all its absurd vacuity, then, is exactly the language of a person with no other goal than the accumulation of information, information which *is* essentially vacuous since it has no other purpose than to be integrated into the "intelligence cycle" in order to produce still more information through the "analysis-collection feedback loop."

This, then, is a view into how Cheney's dark side looked beyond the TV appearances and the legal memos: a world in which a completely empty language circulates from one prison which already tortures to another prison which still has to learn to torture in order to ensure the constant accumulation of information. Based on his discourse, Miller might seem like a character out of a comedy, but his "energizing" of the "feedback loop" was no joke; it would have far-reaching consequences for how the detention facilities were run, including how the prisoners were treated and the U.S. servicemen performed their tasks.

Earlier in the report, Miller had already reported that "This is the first stage toward the rapid exploitation of detainees" (Danner, 205). This phrase leaves us in no doubt as to the way the detainees were viewed: as potential resources to be exploited for information. The question still remains, though: what suggestions did Miller have for "Gitmoizing" Abu Ghraib? Which changes had to be made to the routines of the U.S. soldiers who had taken over this haunted and infamous prison from Saddam Hussein?

The Taguba Report—arguably the most critical of the official investigations into the torture at Abu Ghraib prison—notes that Miller's team's recommendations included that the guard force "be actively engaged in setting the conditions for successful exploitation of the internees" (Danner 277). Behind Miller's bizarre choice of words thus lay a suggestion to perform a *de facto* fusing of Military Intelligence and Military Police, meaning that soldiers from the MP units had to help "soften up" the detainees before they were taken to interrogation in order to "set the conditions for successful exploitation of the internees." This affected what Jane Karpinski, the leader of the 800th Military Police Battalion and in charge of running the prison, calls a "creeping MI takeover" of a prison system in which the MP's were normally only used and trained to run the detention facility and not to conduct any interrogations (Karpinski, 199).

The importance of this fusing of Military Police and Military Intelligence—which really was not a fusing but, as Karpinski also notes, a take-over since the MPs were suddenly not able to carry out the part of the job which included keeping the prisoners safe from harm when they now had to partake in pre-interrogational torture—can simply not be overstated due to how perfectly it represents the informational paradigm that came to fill up the dark side as its organizing principle. It shows that every category of people—be they prisoners or guards—were transformed by a paradigm of information that made everyone into cogs in a machine of accumulation. The perversity of this transformation lay in the fact that information was, as we saw in the above quote, a completely vacuous term beyond the fact that more of it was always better than less.

Almost immediately after the orders to "energize" the collection of information had been given, the abuses in Abu Ghraib prison began with exactly those MP's whose jobs now suddenly consisted in softening up the detainees before interrogation as the main perpetrators. The fact that Rumsfeld and General Miller's visits to the prison coincided with the onset of the torture puts a further spin on Miller's talk about "feedback loop of the intelligence cycle:" on the dark side where information defines everything torturers *also* circulate, their techniques of exploitation spread in the same patterns and with the same perceived value as information. The Taguba Report states with regards to this circulation that:

> MG Miller's team recognized that they were using JTF-GTMO operational procedures and interrogation authorities as baselines for its observations and recommendations. There is a strong argument that the intelligence value of detainees held at JFT-Guantanamo (GTMO) is different than that of the detainees/internees held at Abu Ghraib (BCCF) and other detention facilities in Iraq (Danner, 277).

This paragraph is remarkable: First of all, it clearly shows the connections between the overall U.S. torture regime and the torture at Abu Ghraib. It shows that Miller was in fact sent to Abu Ghraib to "Gitmo-ize" it, as Karpinski claims in her account (Karpinski, 197). Second, it is guilty of an unforgivable, yet symptomatic sin of omission, because it fails to mention that prisoners caught in the Iraq theater *were covered by the Geneva Conventions.* This means that they in fact had, or was at least supposed to have, POW-status with all the protections this offers. The problem was not, or rather the problem should not have been that of a difference in "intelligence value," as if the prisoners were different sized containers holding different amounts of some precious liquid, but a difference in

legality: prisoners caught in the Iraq theater had a different legal status than those caught in Afghanistan for the simple reason that they *had* a legal status. If we once more cut through the absurdity, we therefore see that the Taguba Report falls victim to the exact same mechanism as General Miller's vacuous new-speak and the MP guards at Abu Ghraib: they all talked or acted out the paradigm of information.

The language of the dark side, then, looked less like a dark side and more like the floor of an open office-environment in its most obnoxious new public management version, saturated with empty buzzwords whose form and meaning in no way resembled that of a clear military order. Naturally, this lack of precision corrupted the responsibility and accountability of the U.S. Army's chain of command. Soldiers act on orders and clear mandates from their superiors, and at no time is this more important than in times of war. As a young man, General George C. Marshall once told one of his colleagues that "[o]nce an army is involved in war, there is a beast in every fighting man which begins tugging at its chains. And a good officer must learn early on how to keep the beast under control, both in his men and himself."[95] The chain that holds back the bestial instincts of the fighting men is the chain of command, but all the way from the generalities of Bybee and Yoo's memos and down to Miller's recommendations, the chain of command during the war on terror was less defined by its downwards communication of commands and upwards delegation of responsibility, and more defined by the wiggle room that the metaphor of the chain also implies: if we loosen the chain enough and in just the right way, the mess of legal vagueness, the off-handed statements of a desire to play it rough by key figures in the administration, and the general pressure to accumulate more and more information will work out to create a torture regime all by itself, thereby also conveniently clearing anyone but the direct perpetrators of torture of any responsibility.

That this loosening or recasting of the chain of command was the real reason behind the atrocities in Abu Ghraib prison is also argued by Jane Karpinski, who would end up being given a lot of the blame for the crimes committed on her watch (and often in distinctly gendered terms, implying for instance that she was too "emotional" to properly run such a facility:)[96]

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95 The New York Times. "A Beast in the Heart of Every Fighting Man." April 27, 2011. http://www.nytimes.com/2011/05/01/magazine/mag-01KillTeam-t.html

96. As is stated in the Taguba Report, "During the course of this investigation I conducted a lengthy interview with BG Karpinski that lasted over four hours . . . BG Karpinski was extremely emotional during much of her testimony" (as quoted in Danner, 307). It is impossible to know how other people would have reacted to have pinned on them the responsibility for a disgusting torture regime which was essentially the consequence of an order, but to a civilian Karpinski's reaction seems very much in place.

> Anyone fighting the counterterrorist war in the Middle East had a clear mandate—to extract actionable intelligence for use against our terrorist enemies and growing Iraqi insurgency—but only fuzzy rules of engagement. That was a recipe for "taking off the gloves" in interrogations, and almost inevitably for prisoner abuse (Karpinski, 5).

"Fuzzy rules of engagement" – a wonderful term if not for the horrible events that it led to. And again, we see that Karpiniski's only really clear mandate was to "extract actionable intelligence for use against our terrorist enemies," which was not a clear mandate at all due to the criteria according to which information was valued.

Let us conclude this first insight into how the information paradigm played out in practice by returning once more to Millers recommendations. In "Annex B" to the main document labeled "Information Technology Solutions" he states that:

> The goal of a theater-wide intelligence information technology initiative is *fused intelligence* which will allow for a faster interrogation cycle, faster exchange of information, minimize manual processes, eliminate redundancy, manpower savings, rapid data mining, focused interrogation plan, and an automated collection plan (as quoted in Danner, 213).

Again, the phrasing is nothing short of insane; its rapid enumeration of the "theater-wide intelligence information technology initiative" reads like an obtuse plan for streamlining a private company, and what the various elements in the enumeration in fact mean is impossible to ascertain with any precision. "Technology," for instance, sounds very impressive and high-tech, and some readers would perhaps have envisioned large computers or advanced polygraph machines when they read this if it were not for the fact that in spring 2004 the world discovered what this "technology" really consisted in: the use of dogs on prisoners, sexual humiliation and rape designed specifically to exploit the cultural sensitivities of the so-called "Arab mind", sleep deprivation, stress positions, and brutal, at times even fatal violence – all done by the MPs whose job descriptions had suddenly been changed by General Miller to also include pre-interrogation "softening up." Donald Rumsfeld's claim that the crimes at Abu Ghraib were the work of a small group of guards that "ran amok" is clearly not tenable anymore, if it ever were; the crimes were the inevitable outcome of a logic of information and

exploitation that had been the cornerstone of the Administration and its bipolar world since its very inception.[97]

We have already mentioned the many discursive and conceptual intersections between the paradigm of information and the logic of capital accumulation, and this connection only becomes clearer if we list the most significant terms from Miller's recommendations: exchange, management, exploitation, processes, redundancy, savings, mining, automation. Did the chaotic "shapeless potentiality" of the dark side and the paradigm of information that came to rule it really just turn into an excuse for implementing a parodic version of the language of the private management sector, with torture as its regrettable bi-product? Or are there more fundamental reasons behind Miller's peculiar, yet profoundly destructive language?

A Quantifying Axiomatic

It is easy—perhaps too easy—to denounce everything that sounds the tiniest bit like business and privatization as yet another example of how the curses of neoliberalism and global finance have come to haunt still greater parts of what used to belong to some version of the "commons" – health care, education, prisons, infrastructure, and, in this case, intelligence and army operations. While claims to such an encroachment upon the public sector by private corporations, often with the blessing and support of elected officials, is undoubtedly true (and eminently so when it comes to military and intelligence operations, as Peter Singer and Jeremy Scahill have demonstrated convincingly,)[98] we need to be more exact, at least in the present case, in order to understand the function and necessity of the information paradigm as an organizing principle for the dark side. Even more to the point, we need to ask if there are structural nodes of intersection between certain key aspects of capitalism and certain key aspects of the dark side; if discourse is all they share, or if there are modes of operation that link the two, not metaphorically or coincidentally, but materially and ontologically.

In attempting to answer this decisive, but impossibly large question, we will find support in what Foucault has shown, namely that capitalism cannot be understood as a singular historical

97. "These acts could not conceivably have been authorized by anyone in the chain of command, nor could they have been any part of an intelligence-gathering or interrogation effort. Rather, they were the senseless crimes of a small group of prison guards who ran amok in the absence of adequate supervision" as Donaldd Rumsfeld writes in his memoir *Known and Unknown* (545).

98. See P.W. Singer's *Corporate Warriors* (2003) and Jeremy Scahill's *Blackwater – The Rise of the World's Most Powerful Mercenary Army* (2008) for in-depth analyses of both the state of the private military-industrial complex and the policies that let up to its current success.

phenomenon, but should in fact be understood in the plural; there are more than one capitalism, and to concern oneself with capitalism in the singular will always only be to concern oneself with one version or aspect of it. The version of capitalism with which we will try to understand better the informational paradigm that came to organize the dark side of the bipolar world is the version described and analyzed by Gilles Deleuze and Felix Guattari in their seminal *Anti-Oedipus* (1972).

In *Anti-Oedipus*, Deleuze and Guattari describe how primitive societies are essentially machines that code desire; in indigenous tribes, there are no things one can possibly want and no ways to acquire what one wants that are not coded by a "territorial machine." All transactions—both discursive and of labor, wealth, wives, and children—in such societies constitute a machine of inscription that perpetually codes all relations and desires according to more or less stable chains of signifiers. Society, therefore, is "a socius of inscription where the essential thing is to mark and be marked" (Deleuze and Guattari, 142), and the essence of this marking resides in "tattooing, excising, incising, carving, scarifying, mutilating, encircling, and initiating" (ibid., 144).

While such a territorial machine and the "primitive" societies to which it belongs might seem like an inherently stable phenomenon, a part of Deleuze and Guattari's project is to show that they are not; the territorial machine and the society it produces teeter constantly on their own destruction or impotency and only through the constant recodings can their operations be sustained. Torture can be and have often been part of this process of recoding, leading Deleuze and Guattari to argue that torture in these societies is not wanton cruelty, but "instances of production" that make "men or their organs into the parts and wheels of the social machine" (ibid., 145). That torture cannot be cruel just because it is also a part of social coding is a somewhat questionable claim, but it is an undeniable fact that torture historically—from ancient Greece to the *ancient regime*—has been a vital tool in creating and maintaining specific societal orders, especially highly stratified social orders.[99]

So the territorial machine constantly codes everything, making and channeling desire into patterns that control what would otherwise be an uncontrollable flow. The workings of this machine is not something that can be relegated to an ephemeral realm of "culture" or "symbols;" the territorial machine is society itself,[100] it is what enables the society to remain a society and not dissolve into

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99. This is a whole different story about torture – a story recounted with great insight by Page Dubois in her *Torture and Truth* where she demonstrates the vital role torture played in Ancient Greece as a way to produce and maintain a highly stratified society. While torture always retains traces of performativity this aspect reached its early pinnacle in Greek Antiquity where it was only used on slaves.

100. By using the term "society" instead of "socius" we are attempting to not get too caught up in the somewhat esoteric vocabulary of Deleuze and Guattari; it should however be noted that they, in *Anti-Oedipus*, seem to prefer the latter term.

complete anarchy. This is also what leads Deleuze and Guattari to claim that the thing all traditional societies fear over all others is the setting-free of desire and the uncoding of flows, since such a process would essentially spell the end of society as such by substituting a social order for the total chaos of desires. And such a process is what they call *deterritorialization*, a process that everything in such societies is built to hold at bay.[101]

The Bipolar World As Deterritorialization

As the title of their book suggests, Deleuze and Guattari's project is to wrest theories about desire free from the Oedipal structure introduced by Freud and used as one of the most stable and persistent concepts within psychoanalysis ever since (they even go so far as to call the predominance of the Oedipus complex within psychoanalysis "sheer terrorism" (ibid., 45). The core of their argument is that the Oedipus complex is not a primordial structure, but just one way in which the flows of desire can be coded which is tied to a specific formation of family and culture. Desire, for Deleuze and Guattari, has no innate relation to the father or the mother, nor even to sexuality; desire is nothing but a machine that produces something, anything:

> The unconscious does not speak, it engineers. It is not expressive or representative, but productive. A symbol is nothing other than a social machine that functions as a desiring-machine, a desiring-machine that functions within the social machine, an investment of the social machine by desire (ibid., 180).
>
> . . .
>
> [D]esire is a machine, a synthesis of machines, a machinic arrangement—desiring-machines. The order of desire is the order of *production*: all production is at once desiring-production and social production (ibid., 296).

We see clearly why Deleuze and Guattari need to redefine or refute the Oedipal complex as a primordial structure: if it really were primordial, actual deterritorialization of the society would not be possible since desire would always have a fundamental-ontological coding around which the territorial

101. As with all concepts in Deleuze and Guattari's oeuvre, deterritorialization covers a quite equivocal and complex set of meanings, but overall deterritorialization is the process of decoding formerly coded elements within some sort of meaningful order, opening formerly closed fields of meaning and desire to new meanings and "free flowing" desires.

machine could stabilize itself – an idea that one can in fact find in the writings of Freud.[102] So, desire is nothing but desiring-machines, and in the primitive society of the territorial machine these desiring-machines incessantly produce a specific coding which produces subjects, goods, hegemonies etc., a machine which the primitive societies must maintain through rituals and other transactions in order to keep functioning and thereby hold deterritorialization at bay.

It is clear then that every desiring-machine always starts out as a radically pre-subjective potentiality, as a sort of blank surface that can become anything or as a machine that has still not been configured to produce one specific thing. Such a state is given the name of a "body without organs" by Deleuze and Guattari, and in its radical potentiality it has the following characteristics:

> The body without organs . . . is crisscrossed with axes and thresholds, with latitudes and longitudes and geodesic lines, traversed by gradients marking the transitions and the becomings, the destinations of the subject developing along these particular vectors (ibid., 19).

The body without organ's endless potentiality for becoming leads Deleuze and Guattari to describe its workings as defined by an endless series of "either . . . or . . . or" (ibid., 12) – a list of micro-grammatical syntagma that can never stop but only lead to the next conjunction in an endless series of "ors". Deterritorialization is the decoding of meaning and desire feared by all traditional societies as the absolute breakdown, and the body without organs is produced by this deterritorialization, it *is* in a sense this deterritorialization (ibid., 176), and its mode of functioning is defined by a conjunctive series of "either . . . or . . . or" that have the potential for becoming everything.

We now begin to see that this specific idea of breakdown through deterritorialization very much resembles the one we identified at the end of the first part of this dissertation as the apocalyptic bipolar world: the breakdown of codes (of law), the chaos and paranoia of threats in a perpetual process of becoming, and Bybee's endless *et cetera* of information which really is just another way of expressing the "or . . . or . . . or . . ." of the body without organs. And not only do Deleuze and Guattari consider it to be a breakdown; they describe breakdown through deterritorialization as a "wilderness where the decoded flows run free, the end of the world, the apocalypse" (ibid., 176). The application of Paolo Virno's notion of "cultural apocalypse" to the bipolar world of the legal memos thus gets an added dimension with the addition of *Anti-Oedipus*'s notion of apocalypse; the dark side is a deterritorialized

102. This is exactly the point of Freuds *Moses and Monotheism* (1939) in which Freud attempts to explain the origins of Judaism with reference to a primordial Oedipus complex.

body without organs where decoded desires (both those of the terrorists and the Bush Administration) run free.

Yet, we are still merely left with a somewhat different take on the same argument made by Virno and without an answer to the question about the connection between the dark side, the informational paradigm, and capitalism. In order to arrive at a more satisfactory and productive synthesis we need to focus on what is arguably Deleuze and Guattari's decisive move, namely their realization that the limit of the apocalypse through complete deterritorialization is only the *absolute* limit, and that another limit exists which is precisely the limit introduced by capitalism:

> We shall speak of an *absolute limit* every time the schizo-flows pass through the wall, scramble all the codes, and deterritorialize the socius
>
> . . .
>
> the *relative limit* is no more nor less than the capitalist social formation, because the latter engineers and mobilizes flows that are effectively decoded, but does so by substituting for the codes a quantifying axiomatic (ibid., 176)

Capitalism in this analysis, then, is a "social formation" which is able to organize flows that are "effectively decoded" without recoding and bringing them to order through the installation and workings of a territorial machine. At the heart of capitalism therefore lies an operation that makes a capitalist social formation able to live with what the "primitive" territorialized society cannot live with without total and complete breakdown: the operation of a unique tool referred to as a "quantifying axiomatic."

We have already quoted Zizek for referring to money as a "quantitative determination" that made possible a new way of viewing and organizing the world, and now we see where he might have gotten this idea from: money as an abstract yet countable unit is precisely the quantifying axiomatic whose introduction spells the end of the "primitive," pre-capitalist societies[103] and the beginning of the capitalist social formation. While indeed destroying the primitive territorial machine, this quantifying axiomatic simultaneously prevents the "absolute limit" of an apocalyptic wilderness from setting free all desires and creating a sort of Hobbesian ur-chaos by substituting it for a "real limit" defined as the

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103. This is also what leads to primitive mythological representations of endless flows of matter, a nightmarish idea of endless, destructive wealth: "How can this nightmare be imagined: an irrepressible wave of shit, as in the Fourbe myth; or the intense germinal influx, the this-side-of incest, as in the Yourougou myth, which introduces disorder into the world by acting as a representative of desire" (ibid., 176).

axiomatization of decoded flows. But not only does capitalism organize a deterritorialized field through a quantifying axiomatic. Capitalism and the quantifying axiomatic are themselves sustained by the deterritorialized field, feeding of the uncoded flows of desire that define the body without organs. Capitalism thus produces still greater amounts of deterritorialization that can be subsumed under the quantifying axiomatic; it deterritorializes more and more of society,[104] but immediately subsumes it under the paradigm of its quantifying axiomatic.

While deterritorialization is the name for world-shuttering forces of destruction in the primitive society, deterritorialization becomes a name for the productive forces of capitalism itself within a capitalist social formation.[105] It becomes a name for still larger sectors of society that can be decoded into bodies without organs which, in turn, can immediately be axiomatized by money as the quantifying axiomatic, thereby creating an economy that grows productively as opposed to a wilderness that spreads apocalyptically.

Deleuze and Guattari therefore teach us something that Virno's idea of apocalypse could not, namely that there is a way to deal with the absolute limit of a chaotic wilderness, of a *dark side*, through the quantifying axiomatic operation of money, and that this operation is an essentially constructive and productive operation that transforms the "absolute limit" of apocalypse into the "real limits" of a capitalist social formation. Here, the endless "or . . . or . . . or" of the body without organs becomes endless growth and production, and the body without organs—which before was nothing but free-flowing, destructive desire—becomes appropriated by capital and the quantifying axiomatic of money into precisely the idea of everlasting growth in quantity.

We can now see clearly why the turn to and fetishization of information occurred: the informational paradigm served the function of a quantifying axiomatic which enabled the Bush Administration and its leading officers to turn the absolute, apocalyptic and destructive limit of the dark side into the real, manageable, and constructive limit of the Global War Against Terror. The idea of a bipolar world and its dark side was, as we saw in the first part of this dissertation, a thoroughly destructive idea built around a pure negation of law and the possibility of any sort of normalcy on the dark side and thus in the relation between law and its outside. Yet, if such a negation, if such a *deterritorialization* is allowed to persist, the basic societal order collapses into what Virno called a

104. "Capitalism tends toward a threshold of decoding that will destroy the socius in order to make it a body without organs and unleash the flows of desire on this body as a deterritorialized field" (ibid., 33).

105. "The decoding of flows and the deterritorialization of the socius thus constitutes [sic] the most characteristic and the most important tendency of capitalism" (ibid., 34).

"cultural apocalypse;" a hollowing out of the meaning of and faith in the state, the law, and the power and skills of the executive. Destruction therefore had to be followed by construction, by a re-filling of this deterritorialized space with something other, and this something other was a quantifying axiomatic in the shape of information. Moreover, deterritorialization is not something external to the quantifying axiomatic. They are essentially two different elements of the same operation. Even though our analysis of the bipolar world of the Bush Administration and the ensuing axiomatization by information followed two steps (first the establishment of a dark side as pure negation, then the application of the informational paradigm onto this dark side as a positive axiomatic,) the process was essentially simultaneous: as soon as the dark side was established, the means with which to "work it" were immediately set in place, if they had not already been. The informational paradigm as a quantifying axiomatic immediately took over and immediately had to take over in order not to transform the world into an actual "wilderness" or even an "apocalypse."

When we said that each single nugget of unprocessed information represented a threat to the United States and spurred the onset of "paranoia" in Cheney, we now start to see that the vast amounts of unprocessed information also had the potential to engender the reverse movement: each nugget of information could potentially also represent that tiny piece of decisive information that could be used to avert a future attack on the United States, and information therefore turned into a coveted symbol of a complete signification which would positively define any intervention in and organization of the dark side, even though such a complete signification was in fact impossible due to the open-ended nature of information itself.[106] In short, the empty, negative space of the dark side began to be filled up.

Since the only measurable quality of the epistemology proper to the dark side was that of more and more information, all solid and qualitative concepts from the "light side" were melted into the air by this paradigm, or, rather, melted and recast as supporting structures for the information producing machine. There were no phenomena, no actors and no actions that were not conditioned by this master signifier, nor were there any concepts that could oppose it due to the fact that the dark side, as we saw in the first part of this dissertation, was first emptied of any meaning and relation to truth, law and language before it was refilled with and organized according to the quantifying axiomatic of information. Dark were and are all those arts that contributed to axiomatize the dark side through accumulation of information.

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106. One could make an interesting analysis of the Derridean notion of "consignation" here – the idea, that is, that there exists a perfect archival configuration that can one day be reached and provide total, informational transparency. In his dissertation on digital cultural heritage archives, Torsten Arni Caleb Andreasen calls this (impossible) dream "pleroma," a term which strongly suggests the religious origins of such an idea.

Naturally, the maneuver of applying information as a quantitative axiomatic was not a conscious choice, and we will dare state as a fact that no one in the White House carried around *Anti-Oedipus* as their person bible of crisis-management.[107] Yet, this does not mean that the outcome could not have been different, and that a quantifying axiomatic which put information over all other things was unavoidable: the application of information as a quantitative axiomatic was the outcome of particular choices made by particular key players in the Bush Administration, and among those choices were the insistence on the power of the "unitary executive," the installation of the bipolar world through the legal memos and Cheney's official statements, and the demand to literally be exposed to endless streams of raw intelligence, an exposure which caused a paranoia over the potentiality for threats against the U.S. When first the dark side and the paranoia as its corresponding affect were installed information took over every aspect of every operation as a quantifying axiomatic, including the language of senior officers and the jobs of menial Military Policemen who soon became torturers in the service of information.

Consequences

In this chapter, we have investigated the role played by information on the dark side of the Global War Against Terror, and why information went hand in hand with a discourse more appropriate for an obnoxious private management guru than for a U.S. Army General. This left us with a basic question as to the possible connections between "capitalism" and the informational paradigm—not metaphorical connections, but actual connections—and we now have that: the basic operation of money in capitalism and the basic operation of information in the War on Terror are one and the same, namely that of a quantifying axiomatic which creates, organizes, and feeds off a body without organs produced by deterritorialization. When first the chaotic world of the dark side had been installed by the endless streams of intelligence and the withdrawal of voices and law, the quantifying axiomatic of information was the next step in order to not reach the "absolute limit" of an actual apocalypse.

Because the basic operations of the two quantifying axiomatics are identical, Deleuze and Guattari's theoretical framework gives us a way to elucidate why and how the bipolar world led to torture and why this torture was framed the way it was by the Bush Administration and the agents

107. Even though, as Eyal Weizmann has shown in his *Hollow Land*, Deleuze and Guattari's philosophy has in fact played a significant role in the guerrilla tactics of the Israel Army (Weizman 2007, 187).

involved. The notion of a body without organs produced by deterritorialization and its ensuing quantifying axiomatization may in other words enable us to arrive at a diagnosis of the U.S. torture regime that is more precise as to its specific *modus operandi* than merely saying that it was brutal, inhuman, and despicable, and that due to these qualities (or lack thereof) it should be piled indiscriminately together with every other brutal, inhuman, and despicable torture regime of history.

A specific series of consequences follows from Deleuze and Guattari's analysis of the quantifying axiomatic which we can also apply to the U.S. torture regime based on the claim that the informational paradigm became a quantifying axiomatic in its own right. We have already seen the first play out in the analysis of the present chapter, namely the fact that the quantifying axiomatics persistently pushes its own limits towards still greater deterritorialization and the axiomatization of still larger regions of the dark side.[108] This pushing of its own limits is what happened when Miller went to Abu Ghraib to "Energize the analysis-collection feedback loop of the intelligence cycle with robust, timely, GWOT oriented, collection management planning and execution," even though the intelligence value and legal status of the prisoners at Abu Ghraib prison were in no way comparable to that of the prisoners at Miller's home turf in Guantanamo Bay. What the verb "to Gitmoize" really means then is to make the quantifying axiomatic of information spread to all other codes and decode them, to create chaos and then reorganize this chaos according to pure quantity of information.

In the three remaining chapters, we will follow three more operations proper to the quantifying axiomatic which will serve as analytical nodal points: One, we will see how the shapeless, chaotic potentiality of the body without organs, which in its initial condition was the shapeless, chaotic potential of raw intelligence and endless rivers of threats from all sides and people, is turned into a *productive* potential; everything becomes a potential resource seen through the lens of the quantifying axiomatic, because everything can essentially be decoded and axiomatized through it, even human bodies (as will become clear in the next chapter.) The leveling effects of the quantifying axiomatic makes everything into resources that need to be, in General Miller's words, "exploited" and "mined," since there is no other way to keep the operation going other than to view everything as production sites of information.

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108. As the *Committee Study* notes, "By March 2002, CIA Headquarters had expanded the authority beyond the language of the MON and instructed CIA personnel that it would be appropriate to detain individuals who might not be high-value targets in their own right, but could provide information on high-value targets" (*Committee Study*, 13).

Two, we will see how the quantifying axiomatic is a purely technical operation since there are no substantial or qualitative elements—law, ethics, politics, rights—left on the dark side to make it anything but technical. The technician is the emblematic character of the quantifying axiomatic,[109] and "science" is the emblematic keyword for working the dark side. This strongly connects to the above point about viewing everything as a resource: As German philosopher Martin Heidegger once argued, the heart of technology is the gathering of the world into "standing-reserves," i.e. into resources waiting to be tapped.[110] The world has become pure resource (of information) and the technician is he who can tap this resource as efficiently as possible.

Three, we will see that as soon as the quantifying axiomatic of information was installed the fact that it was the outcome of a specific set of operations was forgotten and became invisible; the notion that the dark side is a purely quantitative space seems to stem or even ooze from the nature of the dark side itself, and so do all the roles in the production of the axiomatic. In this "perverted and bewitched world,"[111] torturers and their victims are irreversibly hidden behind the titles of technician of information and informational resource, and the body without organs has the appearance of an "enchanted recording or inscribing surface that arrogates to itself all the productive forces."[112] The quantifying axiomatic becomes a phenomenological membrane or surface through which everything is framed and through which everything must be framed in order to make sense. It essentially becomes a fantasyland which replaces the nightmare land of the endless streams of threats of the "threat matrix" with a benign, productive realm.

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109. "Whence the obstinacy with which the formations preceding capitalism encaste the merchant and the technician, preventing flows of money and flows of production from assuming an autonomy that would destroy their codes" (Deleuze and Guattari, 176).

110. See Martin Heidegger's 1954 essay *The Question Concerning Technology*.

111. "As Marx observes, in *the beginning* capitalists are necessarily conscious of the opposition between capital and labor, and of the use of capital as a means of extorting surplus labor. But a perverted, bewitched world quickly comes into being, as capital increasingly plays the role of a recording surface that falls back on . . . all of production" (Deleuze and Guattari, 11).

112. "But the essential thing is the establishment of an enchanted recording or inscribing surface that arrogates to itself all the productive forces and all the organs of production, and that acts as a quasi cause by communicating the apparent movement (the fetish) to them" (ibid. 11).

CHAPTER SIX:

BODIES AS FACTORIES

> The first essential step on the road to total domination is to kill the juridical person in man.
>
> *Hannah Arendt, On the Origin of Totalitarianism*

We saw that everything solid was melted into the air by the quantifying axiomatic of information. Yet there are things in this world that appear innately recalcitrant to such a melting, and among such things we would normally count human beings (although the text from which the old adage about solids melting into the air arguably showed exactly the ease with which such liquidation could take place.) One thing, however, is to have a system that turns human beings into workers, another thing is to deliberately make people victims of a torture regime. As we shall see now, the August 1, 2002 "Standards of Conduct for Interrogation" from Jay Bybee to the White House makes an attempt at such a liquidation of human beings (and their affects and their bodies.) This final effort from Bybee had far reaching conclusions.[113]

The memo "Standards of Conduct for Interrogation" concerns sections 2340-2340A of the U.S. Code, sections which represent the implementation of the United Nations Convention Against Torture into American law. In order to understand the context of the memo properly, we will first briefly look at the ratification history of the Convention Against Torture, i.e. the traffic from convention text to actual American legislation. With this historical backdrop, we will see how Bybee in the memo tries to circumnavigate the fact that torture, in the end, is about intentionally inflicting real, excruciating pain

113. It is commonly known that it was in fact John Yoo who wrote this memo and only Bybee who signed it, (see for instance (Siems, 53),) but as per our ambition to take texts in their "positivity," i.e. as they exist, we will assign full responsibility to Yoo's superior Bybee who willingly scribbled his signature at the end of the memo.

on real human bodies, and instead construes the torture victims as nothing but tiny cogs in a greater machine of information production. What this memo does, then, is to phrase formally one of the noted effects of the quantifying axiomatic: it turns the dark side and everything in it—even human beings—into sites of production that can be "exploited" and "mined," as we heard General Miller euphemize it in the previous chapter.

Ratifying the Convention Against Torture

2340-2340A of the U.S. Criminal Code is an implementation of the U.N. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) into U.S. law, with the one decisive caveat that the text concerning the latter part of the title of the convention (other Cruel . . . Treatment or Punishment) would only be punished to the extent that it was "by the 'Fifth, Eight, and/or Fourteenth Amendments to the Constitution of the United States.'"[114] Before going into the text of the memo, we will look at the history of the statute that were to be voided by Bybee's analysis in order to glean some important insights into how and why the Convention Against Torture was ratified.

The Convention Against Torture was signed by Ronald Reagan on 18 April 1988.[115] The Convention was not first of all created to criminalize torture, but to "provide an international system under which the international criminal—the torturer—could find no safe haven" (La Haye, 90). The idea that the Convention marked a new formalization of what already was a crime was also apparent when Ronald Reagan on May 20 that same year endorsed ratification with a message to the Senate containing the following words:

> The United States participated actively and effectively in the negotiation of the Convention. It marks a significant step in the development during this century of international measures against torture and other inhuman treatment or punishment. Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.[116]

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114. American Civil Liberties Union. "The Failure of the United States to Comply with Convention Against Torture." https://www.aclu.org/files/safefree/torture/A.pdf

115. See the U.N.'s homepage for a list of the signature dates of all the participating nations at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec

116. The American Presidency Project. "Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment and Punishment." May 20, 1988. http://www.presidency.ucsb.edu/ws/?pid=35858

In this quote—as in the remainder of the message—Reagan presents the idea that whether a nation tortures or not is something inextricably connected to its core values, implying that Senate ratification will, in essence, only be a "clear expression" of long-held American opposition to the "abhorrent" practice of torture. The language of the recommendation therefore embodies Ronald Reagan's legacy as a president who wanted to include the values of the United States as a cornerstone in its foreign policies instead of the opportunistic realism that had characterized much of the preceding period, where the U.S. had been involved in a serious of blatant failures, most importantly the Vietnam War, but also the intelligence failures concerning the sudden revolution in Iran and the equally unforeseen Russian invasion of Afghanistan.

Richard Nixon once wrote that Reagan "renewed America's faith in its ideals and recommitted America to a responsible world role" (Jeffords, 3) and his idea of renewal strongly echoes Reagan's notion in the Senate recommendation of "expressing clearly." Reagan's message to the Senate is somewhere between the assertive and the performative, somewhere between resuming an already acknowledged role as a beacon of democracy and freedom in the world, and actively inventing this role. Strange as it may sound, it would not be entirely off to describe Reagan's words as having the quality of a married couple renewing old wows just to hear them articulated one more time, not only to relive that wonderful wedding day many years ago, but because sometimes you just need to hear things again to be reminded of who and what you are.

Just as importantly for the matter at hand, Reagan uses the term "practice" to categorize torture. Practice (from the Greek word *praxis*)[117] has traditionally been understood to denote an action that serves both as a means towards an end external to itself *and* an action with an immanent ethical or political value. This means that the concept of practice is intimately connected to the notion of ideology, and by calling torture a practice Reagan therefore manages to establish two important aspects of torture: first, that those who torture do it because they are caught up in an ideology that is inhuman; and, secondly, that torture cannot possibly lend itself to solely utilitarian calculus since, by being a practice, it will always be more than just a neutral means to an end.

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117. The ancient Greek noun "praxis," in turn, stems from the verb "prattein," a word that literally means "to act." A practice, then, is an action, but according to Aristotle in his *Nichomachean Ethics* it is a particular form of action, namely an action that holds within it its own justification: praxis is an activity performed mainly for its own sake, the production of something whose motivation, ethical value, and benefit cannot be external or externalized from the action itself. "For while producing is has an end other than itself, action [praxis] cannot; for good action itself is its end" as Aristotle writes in his *Ethics* (120).

The idea of torture as practice and therefore as representing the values of the politico-ideological system in which it is performed reinforces, to once again use Stephanie Athey's succinct term, the "imaginary constitution" surrounding torture in the eighties, a period where Reagan turned up the rhetorical heat by waging a highly public campaign against Soviet Russia by calling it an "evil empire" (Mann, 145). Reagan's rhetoric, then, is clearly no stranger to Manichaeism, to a fundamental division of the world into good and bad guys, into a light and a dark side. Yet, the abyss between the two poles of Reagan's Manichaeism is never crossed rhetorically, precisely because crossing it would equal turning the U.S. itself into an "evil empire," or in, the terms of this dissertation, to a part of the "dark side." Reagan's Manichaeism, then, is a principle of strict division between incommensurable worldviews, in which "working the dark side" is unthinkable since doing so would, in a sense, be equal to losing the war against the evil empire in the East.

In truth, the U.S. or President Reagan had no decade-old opposition to torture that only had to be "clearly express[ed]": the CIA had sponsored and performed torture abroad for decades and kept up at least the former under the Reagan Presidency through their support of agents and foreign regimes—especially in Latin America—whose tactics of counterinsurgency were well-known to rely on brutal torture. Many police officers and soldiers of friendly (often fascist) Latin American countries had even been trained in the infamous "School of the Americas," a training camp run by the US where torture was routinely taught. The school had existed since 1949 and had had a hand in so many U.S. supported coups in Latin America that it was known throughout the continent as the "escueala de golpes," the school of coups (Languth, 96). Similarly, Jennifer K. Harbury in her penetrating account of US involvement in human rights abuses in Latin America notes that persons "clearly linked to the worst repression in El Salvador, including the murder of Archbishop Romero, were trained at the School of the Americas (SOA) and at other U.S. training centers . . . Significantly, a former SOA instructor has admitted that manuals teaching torture were used at the school" (Harbury, 45).

Yet, hypocritical as it may sound, the version of events where only the ideological enemies of the U.S. tortured was the version Reagan presented to the Senate, as is clear from the 1988 message. And what—in spite of Reagan's lies—also remains correct is that torture in the eighties (and in the seventies for that matter) was something that in the discourse of the time was perceived as having an inherent and unbreakable affinity to evil. What also remains correct is that it was in this mental climate that the Convention Against Torture was ratified and later, in the 1990's, finally entered the U.S. Code during the Clinton administration.

Bybee Strikes Again

Such is the historical and legal backdrop against which Bybee writes "Standards of Conduct for Interrogation" to Alberto Gonzales, the President's counsel, from August 1, 2002. The memo is an attempt to grant U.S. agents who torture immunity from future prosecution according to U.S.C. 2340, the statute implementing the Convention Against Torture into U.S. law, offering those agents what Jack Goldsmith calls a "Golden Shield" against prosecution (Goldsmith 144). That the Office of Legal Counsel has it in its power to dispense "get-out-of-jail-free cards," even for crimes that have not yet been committed, shows how dramatically powerful an institution it is. And the U.S. torture regime shows that when this power is abused there are no limits to the atrocities that might follow.

Formally, the memo's conclusions were aimed at CIA interrogators (Sands 20), but quickly the possibility of such a limitation would turn out to be illusory: the memo's relief of all legal restraints on torture spread quickly and within months had it corrupted "all interrogations in the war on terror" (Margulies 88), spreading its informational paradigm and the techniques for implementing it all over the dark side as we now know that quantifying axiomatics tend to do.

In our analysis we will mostly focus on how Bybee destroys the meaning of the term torture by discursive and interpretative strategies that are natural extensions to the informational paradigm analyzed in the previous chapter. We will see that he does so by purging the tortured subject as much as possible from the text, thereby making torture and its victims into elements of production within the greater information machine – a machine which only fails and becomes potentially criminal in the moment of the victim's death, i.e. when the production process goes wrong.

The memo roughly splits into two parts: a first part which addresses questions of what torture is according to U.S. law (and, more significantly, what torture is not), and a second part that lays out possibilities for escaping legal sanctions even if U.S. agents, in spite of what amounts to a semantic destruction of the term in the first section, have in fact tortured. The text begins with the following declaration:

> You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code (Greenberg et al., 172).

Clearly, though, this is in fact not the beginning; the beginning is the question Bybee refers to ("You have asked..."), the question to which his memo claims to be the answer. We do not know precisely what the question in fact sounded like; was it an informal question, extended from Alberto Gonzales, Bush's adviser, to John Yoo who, according to Jack Goldsmith, "in practice . . . worked for Gonzales" (Goldsmith, 24)? Did the question contain the word "torture"? Did it really have to contain that word for Bybee and Yoo to know what was expected of them?

Again, we don't know, and maybe we should not even care how exactly the question sounded. The sole fact that the administration in fact wanted answers as to how far its agents could go without without being liable to prosecution under U.S. anti-torture law is probably without precedent (Margulies 89) and the very existence of the memo is therefore both significant and disturbing in itself. Moreover, the answer does indeed tell us everything we need to know. Roughly one and a half page into the text, Bybee writes that:

> You have asked us to address only the elements of specific intent and the infliction of severe pain or suffering. As such, we have not addressed the elements of 'outside the United States,' 'color of law,' and 'custody or control' (Greenberg et al., 174).

The reason that these "elements" are not the issue of this memo should be clear: they were already answered in the memos we analyzed in chapter one, memos that concerned precisely the terms of territoriality and custody.

The question posed, then, cannot have been a question about a more general interpretation of U.S.C. 2340-2340A, a question which could perhaps still be viewed as part of a prudent overall perusing of the legislation concerning prisoner treatment in general. Instead, the question undoubtedly related specifically to the last legal obstacle which had to be cleared away before torture could be ordered and done with impunity, namely U.S.C. 2340.

The crux of this legal exculpation *avant la lettre*—and what makes up its undoubtedly most controversial passages—concerns the difficult question of what the term torture actually means. To arm ourselves for the analysis to come, we therefore first need to look closer at the notorious difficulties in defining the term; we have to dig into what can be termed its dual meaning and the possibilities for discursive abuse and obfuscation hidden in this dual meaning.

Defining Torture

The question of how to define torture is a notoriously difficult one; in *The Ethics of Torture* (2009) J. Jeremy Wisnewski and R.D. Emerick write about the term's "semantic promiscuity," and in his book *Torture and the Ticking Time Bomb* (2007) British philosopher Bob Brecher goes so far as refusing to rely on or even attempt a strict definition of the term:

> Real things . . . like torture, can only be described; they cannot be specified exactly, that is to say, defined . . . It is in part the widespread assumption that torture needs to be unambiguously defined before we say anything about it that enables American—and other—governments to get away with trying 'to avoid admitting to apparent cases of torture by simply denying that they qualify as torture at all' (Brecher, 4).

While such a stance does indeed seem reasonable—as will shortly be illustrated by the absurd word-juggling of Bybee's memo—it is sadly not a tenable position if we dream about not only condemning, but also prosecuting those who torture and those who order torture. Many elements can make for a situation where torture is done with impunity, but any start to a truly torture free society must be a set of well-constructed laws forbidding it, and a law cannot forbid what it can or will not define. This does not necessarily mean that a law on torture has to be exhaustive in its listing of which specific techniques of inflicting pain constitute torture, but it does mean that some sort of framework for what (and accordingly what is not) torture must be formalized in and through law.

In order to get a grasp on what makes the term so notoriously fickle, let us first look at how the Convention Against Torture goes about defining it:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public

official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[118]

While certain aspects of the Convention text are indeed problematic (most prominently that torture is only torture under the Convention when performed by a person serving in an ill-defined "official capacity",) what is most conspicuous in its wording is how it both addresses what torture means as an *act* and what torture means as a *feeling*. The Convention, in other words, tries to negotiate the fact that a human being has the capacity both *to* torture and to *feel* tortured, and that torture needs both a victim and a perpetrator to remain meaningful. While merely pointing out this semantic duality is a simple matter, how one goes about navigating between the two parts of the duality is by no means simple, seeing as these two aspects of the word are in a sense more contradictory than complimentary.

Torture as a feeling is, as all other feelings, *acute* in the sense that it is categorically present in the here and now, a point-like phenomenon that must necessarily be present in the here and now to be felt.[119] Because of this point-like quality of a feeling it is never anything beyond its own radical presence, and as soon as the acuity and radical nowness of it is injected with just a drop of temporal distance it is, in a sense, corrupted. To feel tortured is to feel tortured *now*, and the intellectualism that haunts all pieces of prose will therefore always be stretched to its diagnostic extreme when having to describe the feeling of being tortured in so many words.

An action, as opposed to a feeling, is not acute; an action is something that is planned and has an extension in time and space, it is something inherently stretched out in a web of intentionality and narrative. An acute action is strictly speaking not an action, but something else – a habit, a tick, or a compulsion—[120]and for this reason it also almost seems redundant to talk about intentional acts (even though we are well aware that the question of intention is of pivotal importance in law;) an act is always intentional if it is in fact an act. And this intention must the term torture also carry or contain in some measure for it to be torture.

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118 The full text of the convention is available at the U.N.'s website at https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf

119. As Sianne Ngai notes in her *Our Aesthetic Categories*, "acute means 'coming to an edge or a point' and suggests mental alertness, keenness, and quickness" (Ngai, 87).

120. As Felix Ravaisson says in his famous essay *Of Habi*t: "Ultimately, in the activity of the soul, as in that of movement, habit gradually transforms the will proper to action into an involuntary inclination . . . it becomes something attractive and a pleasure only through practice, as a desire that forgets itself or that is unaware of itself, and gradually it draws near to the holiness of innocence," thereby implying that actions without conscious motives are actually not actions at all (Ravaisson, 69).

Torture, therefore, is a semantic nodal point striated by two different temporalities, represented by the torturer and the victim – two different temporalities that nevertheless need to be connected for the word to keep its meaning. As such, the term torture therefore invites us to view it with a sort of double-vision that takes into account both the categorical acuity of feeling and the categorical non-acuity of action. Not coincidentally, this double-vision is exactly what is contained in the word *praxis* which, in English, became the word *practice* which Reagan used to describe torture.

Such a dual meaning must necessarily also be negotiated and to some extent "solved" by the laws in which we place our faith in banning torture nationally and globally, and this is clearly attempted in the Convention Against Torture. In the Convention text the negotiation between torture as an act and torture as a feeling is done by linking these two aspects to questions of *intent* and of *intensity*: torture is an *intentional* act that results in a *severe* (or should we say: intense?) sensation of pain or suffering, be it mental or physical.

The claim that the pain and suffering has to be "severe" in intensity to constitute torture is not elaborated upon in the text, and for good reason; as Elaine Scarry claims in her seminal *The Body In Pain,* pain can be said to be a radically subjective experience[121] and therefore unquantifiable, which, in turn, is one of many dehumanizing effects of torture: it is very hard to represent verbally what one has gone through, and because of this the torture victim often has to struggle not only with the trauma of torture, but also with a feeling of isolation.[122] As Darius Rejali shows in *Torture and Democracy,* this side to the torture victim's predicament has been dramatically exacerbated by the development and use of "clean tortures," which make it hard or even impossible for the torture victim to support his or her claims by showing physical scars (Rejali 409-10). The scars that accompanied and often were a deliberate part of torture in earlier times have deliberately been exorcised from many modern torture

121. "So, for the person in pain," writes Elaine Scarry, "so incontestably and unnegotiably present is it that 'having pain' may come to be thought of as the most vibrant example of what it is to 'have certainty,' while for the other person it is so elusive that 'hearing about pain' may exist as the primary model of what it is 'to have doubt.' Thus pain comes unsharably into our midst as at once that which cannot be denied and that which cannot be confirmed" (Scarry, 4).

122. We have to be clear here: the claim that pain is something radically incommunicable is not *necessarily* what leads to this isolation; as Henrik Rønsbo of DIGNITY told me in a conversation in 2013, the problem is not (as Elaine Scarry seems to think), that "torture victims cannot communicate their pain," and that they feel isolated for that reason. The problem is, rather, "getting anyone to listen."This is also remarked by Rejali who notes that "Whatever the sources of the inexpressibility of pain, they have not been permanently disempowering. Throughout the twentieth century, torture victims persuaded others of the truth in the face of sneaky torturers, manipulative statesmen, societal discrimination, and paralyzed observers" (Rejali 44). This, of course, does not mean that pain does not remain a subjective experience and that defining it through the abstract and general categories of legal prose is a hard task

techniques, thus leaving the victim with no other proof of his or her ordeal than their own testimony, and the public with no trace of an action that would perhaps otherwise have spurred outrage.[123]

If pain is left undefined in the Convention, the question of intent is expanded upon significantly: torturing with intent means to inflict severe pain "for such purposes as obtaining . . . information, or a confession, punishing . . . intimidating or coercing . . . or for any reason based on discrimination." So the text of the treaty vocalizes what we briefly pointed to above: the act of torturing is always mired in a complex temporal schema of intentionality and motive, a schema that cannot be exhaustively mapped by any other device of language than the "purposes such as" of the treaty text.

It should also be noted that questions of defining torture has, at least in principle, never been an issue for military personnel; the so-called "Army Field Manual 34-52" (which was in use through 2006 at which point it was replaced by a new version) states explicitly that "[t]he GTS, GPS, GC, and U.S. Policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhuman treatment as a means of or aid to interrogation" (as quoted in Siems, 62). While this only applies to military personnel, the Field Manual's wording could and should have served as a natural guideline for the War On Terror at large. Instead, the traffic sadly went the other way, with Bybee's redefinition of torture setting off an explosion of abuse, not only within the CIA but also within the Army and in sites under its formal control.

Intent in U.S.C. 2340

These speculations on intensity and intent may seem too academic to have any significant bearing on how actual torture plays out in the world, but what may appear as inconspicuous details can be matters of life or death in the hands of lawyers. In its traffic from treaty to U.S. legislation the above quoted section from the Convention Against Torture, then, underwent some modifications which, if done slightly differently, could perhaps have changed the course of this specifically nasty corner of history. The opening passage in U.S.C. 2340 reads:

123. When Pilar Calveiro writes that "It is important to determine what types of torture are practiced in this network of concentration camps in order to observe what the imperial power does with the bodies, how it processes them, what marks it leaves, and, as a consequence, how it conceives of itself, because the scars it leaves upon the tortured bodies are also the scars inflicted upon the social body as a whole" (Hilde et al., 119) he is thus right, but forgets precisely that most modern tortures are clean, and that the problem thus remains that they leave *no* scars on the social body as a whole.

> (11) torture means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control;[124]

Even though we are still able to hear echoes from the original treaty text in U.S.C. 2340, the statute clearly does something different than its source material with regards to intent: it does not add any examples of which contexts and motives would be included in it. Torture is surely still an intentional act, but intentionality no longer comes with any sort of qualification as to its purpose—punishment, interrogation, discrimination—and thus remains an open question whose answer must be produced by legal interpretation.

The most obvious way to read this lack of qualification and the ensuing openness would be to assume that it is a way to express that any and all motives for torture are covered by the statute and that it, for this reason, is arguably even more restrictive than the convention text; one could, in other words, read it as expressing what in the best of all worlds should be a truism, namely that no motives can ever justify torture. This, not surprisingly, is not how Bybee sees it. Instead of reading the wording of the statute as a wholesale criminalization of torture no matter the motive, he takes the lack of specific qualifiers in the statute as a sign that if torture is ever done with any other motive than the pure infliction of pain—including the motives enumerated in the Convention Against Torture—it would, in fact, not constitute torture. (Siems, 53). The memo thus states that the "infliction of such pain [severe pain] must be the defendant's precise objective" (Greenberg et al., 174) for it to qualify as torture under the statute, the defendant here being the presumed torturer. By this, Bybee implies that any torture performed with a goal other than pure pain and *nothing* but pure pain is, in fact, not torture:

> Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his *objective*, he lacks the requisite specific intent (ibid., 175, my emphasis).

What Bybee essentially does is to take advantage of the fact that the Convention's elaboration on possible motives to torture—interrogation, punishment, discrimination—was left behind when the Convention Against Torture was implemented into the U.S. Code. In doing so, he reserves the label of

[124] Cornell University Law School. "U.S. Code §2340 – Definitions." https://www.law.cornell.edu/uscode/text/18/2340

torture for situations where torture is committed with no other goal than the infliction of pain; a condition that is practically impossible to meet, at least when torture is done under the "color of law" as is also stated as a prerequisite by the statute.

Bybee, in other words, wants us to believe that 2340 only applies when an official chooses to torture a person with no other goal than the infliction of pain while still acting under the "color of law;" he wants us to believe that 2340 was invented only to target what must be an exceedingly marginal group, namely officials who spend their official time hunting down and torturing people with the exclusive motive of inflicting pain. This, of course, is well-nigh impossible. Torture is always done with some sort of purpose—as the Convention text also recognizes clearly—and if it is not, it is almost impossible to put into language as anything but pure pathology.

Bybee's analytic strategy here is therefore to deliberately misunderstand or ignore how the intentionality of an act of torture is always a practice – an action, that is, for which it does not make sense to distinguish means from ends. Even if the question of intent indeed is an important and difficult question in much other criminal law, you do not torture without the intent of torturing, even if that intent is part of a larger web of intentions regarding national security, confessions, discipline etc. "In interrogation, if you knowingly inflict pain, it's because you are trying to inflict pain. This is one context where specific intent and knowledge empirically coincide," as David Luban succinctly puts it (Greenberg (red.), 59). And for any just marginally congenial reader of the statute this should also be the conclusion. But Bybee is most definitely not a congenial reader. He is a reader with a mission.

The obvious question is of course how Bybee finds himself able to read 2340 in a way that so clearly goes against the Convention Against Torture on which it is based; we recall that in the text of the Convention it is clearly stated that torture done "for such purposes as . . . information . . . confession . . . punishing . . . or intimidating" is precisely what is banned. Can he really get away with this? It seems doubtful, not only to us, but, if we read the memo closely, also to Bybee himself. Later in the text, when he discusses his interpretation of 2340 against the text of the Convention, he thus writes that:

> Unlike Section 2340, this definition includes a list of purposes for which such pain and suffering is inflicted. The prefatory phrase 'such purposes as' makes clear that this is, however, illustrative rather than exhaustive. Accordingly, severe pain or suffering need not be inflicted for those specific purposes to constitute torture; instead, the perpetrator must simply have a purpose of the same kind (Greenberg et al., 184).

Does Bybee not here arrive at the *exact opposite* conclusion than the one he reached when he discussed the nature of intent earlier? It would seem so; but as soon as we turn our gaze to the minuscule footnote at the bottom of the same page we find his solution to the mess he has brought himself in:

> To be sure, the text of the treaty requires that an individual act "intentionally." This language might read to require only general intent for violations of the Torture Convention. We believe, however, that the better interpretation is that the use of the phrase "intentionally" also created a specific intent-type standard. In that event, the Bush administration's understanding represents only an explanation of how the United States intended to implement the vague language of the Torture Convention. If, however, the Convention established a general intent standard, then the Bush understanding represents a modification of the obligation undertaken by the United States (ibid., 184).

It is not strange that this decisive point is relegated to a footnote in a font so small that it is hardly legible; what Bybee essentially says is that general intent (which means that torture performed with the motives mentioned in the Convention text definitely qualifies as torture) is not general intent anyway, but that the text should be read as creating a "specific intent-type standard" (torture is only torture if that is your only goal.) In arriving at this conclusion, Bybee even has the audacity to claim that his interpretation is a way to rescue the Convention from itself by specifying the meaning of its "vague language," even though, as we have seen, it is in many ways *less* vague than the statute that implements it. Lastly, and quite baffling, Bybee adds that if his reading is not congenial with the Convention (which it obviously is not) then he has just basically changed the treaty obligations of the United States single handedly.

Bybee's thus blatantly goes against the wording of the Convention and construes torture as an intentional act which can categorically only have one vector of intent in order to remain torture. This means that the torture of a prisoner at Guantanamo is not torture at all if it turns out that the torturer's motivation was *anything but pure sadism*, and it also means that if you are ordered to torture someone you cannot be found guilty, since you could always claim that your motives in that case were first of all to follow an order. Such zero-sum notion of intent eradicates the relation between torturer and victim, a relation in which the torturer must (as we shall see in the next chapter) always adjust his techniques, listen to his victim's moans, and be attentive to his victim's body, no matter what other motives he or

she might have for torturing. The act of torture—as opposed to how Bybee understands it—therefore *categorically implies* the very meaning of the word intent, that is a *stretching-out,* not only in time, but a stretching-out to the victim, an *attention* to the victim, a basic, albeit perverted form, of *caring* for the victim.[125]

The only way, then, that Bybee is able to establish his highly peculiar notion of intent is by focusing strictly on the torturer while, at the same time, purging from the text any mentioning of the torture victim. If the torture victim does not hover in the background as the subject who must suffer the torture, as the subject who the torturer in an extremely visceral way has to grab, punch, or shout commands at, the notion of intent can be reduced to speculation on the purely formal content of the torturers mind. If forced to read about the waterboarding of a person done with the intent of procuring information, no one would ever doubt that this act did indeed constitute torture; but if we are walled up in the mind of the torturer we might just convince ourselves that his acts are not about torture. The fact that the only person taken into account is the torturer has the paradoxical consequence of him not being a torturer: how can you be a torturer if there is no victim?

What Pain Feels Like

With the question of intent out of the way, Bybee confronts what we identified as the second aspect of the word torture, namely its meaning and intensity as a feeling. In its description of physical pain, statute 2340 sticks to the wording of the Convention Against Torture, going no further in its elaboration than to state that the pain must be "severe." As we argued earlier, the feeling of pain is notoriously difficult to quantify seeing as pain is a radically subjective feeling, but this is of course not a satisfactory conclusion for Bybee since any recognition of this would be to steal away the right to define torture from the torturer and put it into the hand of the victim: through the feeling of pain, the victim would be subjectivized and allowed to take center-stage. It is also clear that while Bybee was able to obliterate the victim from his analysis of intent by focusing solely on the perpetrator of torture, he faces an even harder challenge here: how do you escape thinking about the plight of the victim when the victim's plight is exactly what you need to address?

125. As W.G: Sebald writes in his *Austerlitz*: "I read Jean Amery's description of the dreadful physical closeness between tortureres and their victims, and of the tortures he himself suffered in Breendonk [a Belgian prison] when he was hoised aloft by his hands, tied behind his back, so that with a crack and a splintering sound which, as he says, he had not yet forgotten when he came to write his account, his arms dislocated from the sockets in his shoulder joints" (Sebald, 34).

The first thing he does is to turn to a dictionary in order to glean the meaning of "severe" as defined there, only to conclude that "the adjective 'severe' conveys that the pain or suffering must be of such a high level intensity that the pain is difficult for the subject to endure" (ibid., 176). Difficult for which subject? What does "difficult" in fact mean? Is pain ever *easy* to endure? What does enduring mean? Normally, we would turn to the victim to ask her or him these questions, but this is not an option here; no victims must be asked if Bybee's legal operation is to be successful. Clearly unhappy with what the dictionary offers him, Bybee instead turns to searching for other places in the U.S. Code where the term "severe" is used, with the hope of finding and borrowing a definition that pleases him. He does indeed find the word "severe" in one other place, namely in a statute defining an emergency medical condition:

> These statutes define an emergency condition as one 'manifesting itself by acute symptoms of sufficient severity (including *severe pain* [italics in original]) such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in .. placing the health of the individual . . . (i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part' . . . These statutes suggest that 'severe pain',' as used in Section 2340, must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body function—in order to constitute torture (ibid.).

What Bybee does here is so strange as to almost defy belief: he essentially generalizes the manifestation of a show of pain that can be a *possible* symptom for imminent "organ failure" to also be the pain-quantifying yardstick used to define torture. The glaring problem with this is that Bybee deliberately gets a possible symptom and the ailment that causes it mixed up (he, in the words of Joseph Margulies, confuses "an illustration with a definition" (Margulies, 91-92);) the pain that might accompany "organ failure" is, in the statute he quotes, not interesting because of its severity as such, but because of the possible semiotic qualities of this pain – because, that is, of its ability to function as a sign that something is horribly wrong and that the person suffering must be given immediate medical attention. Implicit in the medical emergency statute, moreover, is that severe pain is only one among many signs of organ failure—implied by the parenthesis "*including severe pain*" [emphasis added on "including"]—which of course means that organ failure can also happen without the special semiotic

marker of severe pain being visible for the onlooker. People die all the time without feeling a fraction of the physical pain that the victims of the U.S. torture regime have felt; they die maybe without any outward show of discomfort, or they die feeling dizzy, feeling tired, feeling numb, and these deaths are no less ultimate because they did not happen writhing in pain. There is therefore no "s*imilarly* high level" of pain inevitably accompanying organ failure that can be used as a meaningful measuring rod for what feeling tortured really feels like. There is only *a* pain which might just be a sign that a person is seriously ill, but which definitely is always felt when a person is tortured, and to claim anything else is to severely mistake correlation for causality.

That torture only becomes torture when it causes pain equal to that of organ failure not only gives Bybee a way to quantify pain and eliminate torture. It also makes it so that only the victim's death will ever grant him or her any possibility of regaining subjectivity, at which point it is of course too late. Death or the imminent threat thereof, then, is the only entrance-way to subjectivity and embodiment for the detainees, but even here the U.S. torture regime did not deviate from the logic on which it was built: subjectivity could only be regained by death if the death was the consequence of deliberate mistreatment at the hand of the interrogators. Death by other means had no subjectivizing role to play. This, again, might seem like pure semantics, but that is only so because most of us do not have the fantasy to imagine otherwise. The fact of the matter was that those who committed suicide out of pure desperation over the perspective of indefinite incarceration and torture were not allowed to regain just a slither of subjectivity posthumously, precisely because they had chosen to die *themselves* and had not been killed by a clumsy torturer:

> 'They are smart, they are creative, they are committed,' Admiral Harris said. 'They have no regard for life, neither ours nor their own. I believe this [the suicide of three Guantanamo detainees] was not an act of desperation, but an act of asymmetrical warfare waged against us.'[126]

This quote concerns the suicide of three Guantanamo detainees in 2006 and while it is hard not to be appalled at the way Admiral Harris talks about the death of three men who were in his custody and thus under the responsibility of the U.S. army, the underlying logic of the statement is completely congenial

126. The New York times. "3 Prisoners Commit Suicide at Guantánamo." June 11, 2006. http://www.nytimes.com/2006/06/11/us/11gitmo.html?pagewanted=all&_r=0. Clive Stafford Smith goes so far as to call this statement the "most offensive thing the military had said to date"(219).

with Bybee's memo: death by the prisoners' own hand did not qualify as a truly subjective act, but was just one more sign that the dark side had not been mapped thoroughly enough, that more information was needed. The suicides were an expression of the dark side where information was still the only viable currency, and Harris' statement illustrates perfectly the far-reaching consequences of this paradigm: the detainees were workers in the information producing machine, and if they committed suicide they did so according to a logic of sabotage that could only be thwarted through the extraction of even more information. In this way, torture was only torture—and thus illegal—when torture was done wrong and the machine broke down. What Bybee really did was therefore to incriminate only badly performed torture, torture that kills.[127]

Mental Pain and Suffering

We will recall that both the Convention and the statute not only cover infliction of severe physical pain, but also of "severe . . . mental pain or suffering." In order to really offer impunity to agents who torture, Bybee therefore also had to address this category of torture. As opposed to physical torture, Section 2340 defines mental torture quite exhaustively:

> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or

[127] When Thomas C. Hilde writes that "[a]part from seeming to allow any abuse short of death", the memos avoid mentioning the "perfection and institutionalization of techniques such as stress positions, extreme isolation, and sensory deprivation," he is therefore more than correct; preventing the victim's death is part of the task of the torturer and specifically so in the U.S. torture regime where death became the only benchmark for when torture was considered torture (Hilde et al., 3).

(D) the threat that another person will immediately be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;[128]

It is clear that Bybee really had his work cut out for him at this point: how to keep the categorically subjective notion of "mental pain or suffering" from interfering with a text that precisely attempts to purge away any notion of the tortured subject? Is that even possible? The unstoppable Bybee is at least willing to give it a go, and to start with he strikes upon the notion of "prolonged mental harm" with which he attempts to go through the same steps as he did with physical pain, by turning first to a dictionary and then to the U.S. Code at large to see if the phrase appears anywhere else (Greenberg et al., 178).

Not surprisingly is he able to find a dictionary entry for "prolonged," providing him with the quite commonsense idea that "To prolong is to 'lengthen in time' or to 'extend the duration of, to draw out'" (ibid., 177). Yet, while the dictionary helps him once again, nowhere in the U.S. Code can Bybee find a use of the term "prolonged mental harm" which can help him the same way that "severe pain" did in the above. He therefore has to use what he finds in the dictionary as the starting point for his definition of prolonged mental harm, concluding that "the development of a mental disorder such as post-traumatic stress disorder . . . or even chronic depression . . . might satisfy the prolonged harm requirement" (ibid., 178). This is as close as he gets to a definition and it is not hard to see why; without the help of an obscure reference to another part of the U.S. code, Bybee would have to dig deeper into what prolonged mental means for the victim of torture, and this would again equal opening a door for a subjectivity that has no meaning on the dark side. Instead of occupying himself anymore with the dangerous topic of what prolonged mental harm could possibly mean, he immediately turns to questions of intent:

> The statute requires that the defendant specifically intend to inflict severe mental pain or suffering. Because the state requires this mental state with respect to the infliction of severe

[128] The first thing to notice is the discrepancy between this lengthy description of what "severe mental pain and suffering" covers and the sparse description offered when it came to physical pain. By induction it would seem reasonable to assume that the very short description of the latter was deemed sufficient by the legislators because every reasonable person would, in fact, be able to identify what severe physical pain means. Conversely, the fickle notion of mental pain needed quite a bit more elaboration in order to serve its legal function.

> mental pain, and because it expressly defines severe mental in in terms of prolonged mental harm, that mental state must be present with respect to prolonged mental harm (ibid., 178).

This interpretation presents the exact opposite logic than the one we found in Bybee's interpretation of physical pain: if intend to torture with regards to physical pain was present in a case where the torturer's only intent was to cause pain *here and now*, the causing of mental is only torture if the torturer performs it with the wish to impose a lasting effect on his victim. Mental torture can, in other words, never be defined according to the subject's acute feelings of extreme mental agony, but only hinges on whether or not the victim—in some vaguely defined future—will also suffer from mental harm in the future. And not only must the latter be the case, but the torturer must also specifically intend for this to happen in order to have tortured; what happens here and now is suddenly of no importance, only what happens in a hardly defined future.

In this section, we therefore see a different strategy for purging the tortured subject from the equation: his or hers predicament in the actual torture situation is not important, the only thing important is the torturer's expectation as to how the victim will fare months or years from the ordeal he or she presently puts the victim through. And not only that; the torturer must also *want* for a specific future psycho-pathological outcome to take place in order to be a torturer – he must torture with the specific intent of creating a future version of the victim that suffers mentally ("Or put another way, a defendant has committed torture when he intentionally inflicts severe physical pain or suffering with specific intent of causing prolonged mental harm" (ibid., 179).) So here we have one more strategy of "disappearing" the victim and the victim's subjectivity: this time he or she does not disappear into the idea of "organ failure," but into the vagaries of a future mental state which must be pathological, and intentionally so on the part of the torturer, in order for torture here and now to qualify as exactly that.

Organ Failure and Reasonable People

One last purging of the subject and the victim remains in this most notorious of many memos from the time deserving of that title, and this purging relates more than anything to the quantifying axiomatic of the informational paradigm. The purge is performed by using one specific word, a word employed by Bybee when he has to deal with and redefine what constitutes a "threat." When is an action—verbal or physical—a threat? According to whom? What does one have to know to gauge whether something is a threat or not?

> Based on this common approach, we believe that the existence of a threat of severe pain or suffering should be assessed from the standpoint of a reasonable person in the same circumstances (ibid., 179-180).

The decisive word, then, is "reasonable:" a threat is only a threat if a "reasonable person in the same circumstances" would consider it a threat. And with this, Bybee short-circuits the victim's voice one final time, at the precise moment when we thought that he could not possibly hold off the experience of real people any longer, doing so by constructing a "reasonable person" as a sort of dummy torture victim who can speak exactly the words he wants to hear. He even goes so far as to call this his "common approach," thereby indicating that commonality in fact exists between an ordinary "reasonable" person and a person in a torture prison. The idea of appealing to general and abstract reason when it comes to the plight of a person who is put on a plane, often after having been tortured for months in a foreign country and flown to a faraway prison where he will live indefinitely at the mercy of his interrogators, is nothing short of ludicrous. There is no "reason" in such a system, let alone in the specific torture situation to which Bybee refers.

Bybee's memo thus lays waste to the vagaries and subjectivities of human psychology. The memo deliberately fails to acknowledge that an action, its consequences and its affects can never be isolated from the situation in which it is performed, and that this holds especially true with regards to extreme situations such as those at various CIA and Army prisons. Human reactions to torture are individual[129] and so are the long-term consequences, yet, there is no room for such ambiguities in Bybee's analysis, which seems to shunt basic human psychology as much as it shunts the law.[130]

When Dick Cheney became "paranoid" due to the influx of raw intelligence no one—let alone Bybee or Yoo at the Office of Legal Counsel—demanded that Cheney be "reasonable" the same way that Bybee implicitly asks the victim of torture to be reasonable. A reasonable person is not a proxy for the victim and you cannot be a *bonus pater familias* when you are not allowed to see, call, or meet your

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129. See for instance Lone Jacobsen and Edith Montgomery *Treatment of Victims of Torture* for a short, but concise enumeration of possible psychological and physical reactions to torture (in *The Phenomenon of Torture*, Willam E. Schulz (red.), pp. 285-96)

130. As JacoboTimmerman describes in his *Prisoner without a Name, Cell without a Number* (1980), the Argentinian military junta was also obsessed with imprisoning and torturing psychologists and psychiatrists in order to clean out people who insisted on the vagaries and unpredictability of the human subject (98-99).

familiy – these terms cover everything the victim is not due to the circumstances he has been forced into.

Yet, the fact that the memo contains all these inconsistencies and errors does not mean that it was in any way a glitch in the legal-political ontology of the bipolar world; the use of "organ failure" and a "reasonable person" as impossible measuring rods for when something is physical or mental torture can be flawlessly inserted into the logic of the dark side, even if it takes a little work. It even appears that Bybee realizes this when he half-way through the memo—a genre which supposedly is used to enlighten the president about the lawfulness of specific actions—goes way beyond his given mandate in order to frame his legal analysis:

> It has been reported that the al Qaeda fighters are already drawing on a fresh flow of cash to rebuild their forces . . . Al Qaeda continues to plan further attacks, such as destroying American civilian airliners and killing American troops, which have fortunately been prevented . . . Interrogation of captured al Qaeda operatives may provide *information* concerning the nature of al Qaeda plans and the identities of its personnel, which may prove invaluable in preventing further direct attacks on the United States and its citizens. Given the massive destruction and loss of life caused by the September 11 attacks, it is reasonable to believe that *information* gained from al Qaeda personnel could prevent attacks of a similar (if not greater) magnitude from occurring in the United States (Greenberg et al., 201-2, emphasis added).
>
> . . .
>
> It may be the case that only successful interrogations can provide the *information* necessary to prevent the success of covert terrorist attacks upon the United States and its citizens (ibid. 207, emphasis added).

The wording is really quite bizarre: unidentified "reports" about "further attacks" that have "fortunately been prevented." How does one thwart attacks that Al Qaeda has only begun to plan or continues to begin to plan? Is the threat over or not? Paolo Virno's identification of a "cultural apocalypse" as the situation in which the "not yet" and "never again" exist simultaneously is clearly (and eerily) identifiable here, and so is the possible transition from paranoia to reassurance through the quantifying axiomatic of information: all already-averted-but-not-yet-averted threats will not be a problem if we get information enough, but we can never get information enough since all these threats will always

already refer to future attacks, to future plans of attacks. Success will therefore only be measured—*can* only be measured—by ever growing amounts of information.

The notions of "organ failure" and a "reasonable person" are different markers for the same function of the detainees and their bodies in the quantifying axiomatic. Before organ failure sets in due to badly performed torture, the victims are literally bodies without organs, representing the exact same thing that the body without organs does in Deleuze and Guattari's description of the "capitalist social formation:" a shapeless, productive potentiality, a machine that can become and produce anything, but which must be forced to produce only one thing by the quantifying axiomatic, namely information. The body without organs becomes an enchanted resource. With this, we are reminded of other and more original meanings of the word *organ*: before denoting a body part, it had the general denotation of a tool and the specific denotation of a musical instrument. If we have forgotten these original meanings of the term, we are reminded of them when we read Bybee's text where bodies are indeed tools or instruments that, if played or used correctly, will give off information, but if played incorrectly will break and perhaps incriminate the unskilled torturer. Working the dark side is to work properly with organs, to make organs play and add to the quantifying axiomatic which is the only epistemology and organizing principle of the dark side.

One of *organ's* cognates in Greek is *ergon*, to work, and Bybee precisely lets the notion of work(ing the dark side) absorb any other meaning that it could possibly hold or refer to, subjectivity for instance. When the organ is worked properly it disappears. The body of the detainee is a body without organs because it is nothing but the enchanted site of the *ergon* of the torturer. When this work, or this *ergon*, is done properly the organs themselves become invisible, since everything and everyone are only visible as tools in the procurement of information. The bodies and minds of the detainees are not only merely important as sites of production, the fact that they are sites of production also prevents them from being seen as anything else.

Moreover, the idea of a reasonable person resonates strongly with the quantifying axiomatic and the body without organs. Organ thus traditionally also refers to one other thing; Aristotle's six books on logic which are traditionally referred to as *The Organon*, the *instruments* (of thought.) We do not need to get lost in the dense woods of philosophy to realize that this use of "organ" creates a direct link between organ and reason, between proper use of the detainee's organs through the correct *ergon* of the torturer, and the idea of how a "reasonable person" would assess the situation. And again, it is the reason of the torturer that is appealed to and not that of the detainee; the only reason which applies on

the dark side is the general reason of the quantifying axiomatic, a reason of amassing information in which the detainee is, again, nothing but a site of production.

Vilification?

Following our attempts at demarcating accurately the logic of the U.S. torture regime against other ideas and imaginaries on torture (be they liberal-democratic or sovereign-authoritarian,) it is important to realize that removing the torture victim from the text in order to redefine what intent and intensity means is by no means the same as reducing him or her to "bare life" or to "dehumanize" him or her, and that Bybee's memo therefore does not represent an act of vilification in the normal sense of the word. As we know from some of the worst tragedies of human history, such a maneuver can only happen through a long, deliberate process; in the great Nazi campaigns in the thirties the Jews were not presented as merely not human, but as *anti*-human, as subjects whose corrupting effects on German society would only be over when every last of them was transported to his or her "grave in the sky," as Paul Celan describes it with tragic pathos.[131] The totalitarian dream is not that of a bipolar world; the totalitarian dream is that of a world in which everything is "clearcut and orderly" (Timmerman, 95), where all chaos and unpredictability has been destroyed.[132]

In the legal memos there are no (anti-)humans left to vilify, there are no adjectives to denounce or slander a specifically targeted group of people. Instead, the constructions of the memo belong to a totally different paradigm than that of the great totalitarianisms and their conspiratorial iconophilia: This is what a human being looks like (or does not look like) on the dark side of the bipolar world where voice, law, and truth are lost and where the informational paradigm axiomatizes everything, including victims of torture and finally the act of torture itself. On the dark side there are no humans, let alone victims, since these categories are well-known and carries with them some sort of epistemological and ontological familiarity; nor are there any anti-humans since the notion of anti-

131. As the Nuremberg trials noted with regards to certain key actors in the Nazi propaganda machine: "It is thus clear that a well thought-out, oft-repeated, persistent campaign to *arouse the hatred* of the German people against the Jews was fostered and directed by the press department . . . The campaign's only rationale was to blunt the sensibilities of the people regarding the campaign of persecution and murder which was being carried out . . . Their clear and expressed purpose was to enrage Germans against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of the measures of racial persecution to which Jews were to be subjected" (as quoted in Herf, 22-23).

132. As Hannah Arendt notes on the nature of totalitarianism: "Total domination, which strives to organize the infinite plurality and differentiation of human beings as if all of humanity were just one individual, is possible only if each and every person can be reduced to never-changing identity of reactions" (Arendt 2004, 565).

humans also necessarily takes on some sort of conceptual commensurability between the positive and negative: we are good, they are bad, we are decent, they are corrupted etc. The only thing we can say about the non-persons of Bybee's memo—the torture victims—is that they are resources that can be gathered and harvested, and that when we treat them as resources we cannot also be torturing them since we cannot also see them as humans. The idea of human beings as pure resource is a trope we know well from various popular cultural dystopias; in *The Matrix* (1999) human beings are used as batteries, in *The Island* (2005) they are used as reserve parts for the wealthy, and in *Mad Max: Fury Road* (2015) the protagonist is referred to as "blood bag," i.e. as literally nothing but a container of blood to be used by the main villain; in Bybee's memo it is not body parts or electricity that is sought with such fervor, but information.

This also means that they are seldom referred to as terrorists; they are not first of all terrorists, but bearers of information that has to be harvested through various technologies of pain in order to map out the dark side. In this process there can be no truth or falseness as to the villainous nature of the terrorists, since villainous or not is really not the issue at hand; the dark side is not dark because it is evil, it is dark because it literally has no light cast upon it which can enable one to make out contours of human beings, friends or enemies. The only thing one is able to make out is the contour of something which can provide one with information. When Israeli philosopher Adi Ophir claims that "targeted killing" has "replaced torture as a special kind of state terror in which the use of violence is intimately linked to an intensive interest in designated individuals" (Hilde et al., 35) we must therefore question whether Adi Ophir is in fact correct – not in linking drone warfare and targeted killings to torture, but in claiming that what links these two techniques of security is their common "intensive interest in designated individuals." Is Bybee's memo and its discourse on the tortured subject not exactly exposing U.S. torture's radical *dis*interest in designated individuals? Is the idea of an "intensive interest" in the torture victim not an idea that belongs to the well-known torture regimes of history, and, for this reason, also an anachronistic idea, an idea that obfuscates how the actual ontology of the "individual" was constructed in the U.S. torture regime?

The memos we have analyzed give an affirmative answer to these questions: it builds on a certain idea of the body of the detainee as a site of production, as a part of a machine that is propelled by a desire to produce yet more and more information according to the already outlined operation of a quantifying axiomatic; information serving military necessity, serving our interests abroad, serving the interests of our allies *et cetera.* The body producing this information is a body that has no positive textual phenomenonology until the very moment of death – notably a death at the hand of its (badly

performing) torturers, since death by its own hand does not even count as death, but as asymmetrical warfare. In death, the detainee finally receives his organs and becomes a fully-fledged individual once again, but he receives them in the shape of a machinery now defunct: this machine can no longer produce the information we need.

The act of torture in Bybee's memo therefore skips over questions of identity or friend/enemy-divides as you would skip over the question of what to call a piece of rock from which you intend to mine gold; any naming of the rock is senseless since the rock is the last thing you are interested in. Its riches, in this case information, is a signifier—the only signifier—that obliterates all other signifiers, and it is a signifier that signifies nothing other than its own amassing and endless accumulation. Ronald Reagan's idea that torture is a categorically evil practice is less than a distant echo. It belongs to a completely different world, and definitely not a bipolar world which must be discursively installed again and again in order for the absurdities to not look like absurdities. Bybee's mid-memo essay appears exactly as the writing of a man who suddenly realizes what he is really doing, but instead of taking the consequences of this moment of clarity he hurries up and reinstalls the bipolarity and the informational paradigm of the dark side in order to reassure himself and his superiors. The paranoid flood of amorphous threats is turned into a productive paradigm of quantifying axiomatics which come to organize the dark side, and in the following chapter, we will explore the next aspect of this operation, namely its relation to a “science” of torture.

CHAPTER SEVEN:

IN THE LABORATORY

> Knowing nothing has meant that the public does not even realize how frequently the CIA has failed.
>
> *Victor Marchetti and John D. Marks*

Throughout this dissertation, we have moved still closer to actual torture by depicting, first, a chaotic dark side of paranoia and shapeless threats lurking around every corner, and, second, by documenting how this dark side was transformed into a productive body (without organs) by a quantifying axiomatic in which information became the only viable currency. We have already seen how this axiomatic did something fundamental to how those involved in the War On Terror perceived language, their jobs, and even human subjects, changing all and everything into cogs in a machine built to and sustained by the procurement of information.

Through readings of the *Senate Select Committee on Intelligence*'s 2014 *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*[133] and one last legal memo from the prolific Jay Bybee (sent on the same August 1, 2002, as the previous memo, but released to the public much later) we will now focus on the idea of information procurement and torture as a purely "scientific" and "technical" operation, or, to compound the two, a *techno-scientific* operation. As we have already suggested, such a techno-scientific approach to the world is inherently connected to the

133. Since the Committee study contain several highly remarkable redactions, we "quote" from it by using screendumps; this, sadly, makes for a somewhat unappealing or more difficult reading experience, but it is necessary in order to gain an insight into the nature of the U.S. regime of redaction.

"capitalist social formation," and the quantifying axiomatic which is not only proper to it but defines its whole operation:

> It will be necessary to await capitalism to find a semiautonomous organization of technical production that tends to appropriate memory and reproduction, and thereby modifies the forms of the exploitation of man; but as a matter of fact, this organization presupposes a dismantling of the great social machines that preceded it (Deleuze and Guattari, 141).

Again, we should note that Deleuze and Guattari's definition of capitalism is somewhat idiosyncratic—or at least different from that employed by mainstream economists—in how it assumes the operation of capitalism to basically be about deterritorialization of previously coded (or "territorialized") social formations into a body without organs and the immediate organization of this new deterritorialized space through the quantifying axiomatic, instead of being, at its most basic, about private ownership of the means of production.

Definitions aside, the important thing in this quote is that the techno-scientific operation of capitalism is defined as "semiautonomous," as a way of approaching the world, that is, which immediately tears itself (almost) completely loose from any previous codification and assumes total independence. Yet, we must not forget that the techno-scientific operation is only *semi*autonomous, because—and here Deleuze and Guattari align themselves with a long Marxist tradition—it is in fact not autonomous at all, but only an expression of an underlying social dynamic: "a technical machine is therefore not a cause but merely an index of a general form of social production," (46) or, as Marxist philosopher Georg Lukács once wrote, "all economic or 'sociological' phenomena derive from the social relations of men to one another" (Lukács, 29). The techno-scientific paradigm, then, is a mediation of underlying social forces, even if this fact is quickly forgotten through its fetizschization and the incessant workings of the quantifying axiomatic which, as we have seen, make everything into a site of production, even human subjects.

If the paradigm of information is indeed another version of capitalism's quantifying axiomatic, we would expect to find a parallel appropriation of "memory and reproduction" within the U.S. torture regime, and as will be clear in this chapter, we certainly do find such an appropriation, and even imminently so, since the act of torture in the U.S. torture regime was precisely a techno-scientific appropriation of the victim's memory. Before going into how the techno-scientific approach to torture came to dominate the U.S. torture regime, we will take a detour to the history of CIA's torture research

in order to see how this connects (and in decisive aspects does not connect) to how torture was viewed and used after 9/11.

The Ghost of McCarthy

The idea that torture can be a "scientific" procedure is certainly not something new. As legal historian John Langbein has shown in his seminal *Torture and the Law of Proof* (1976), torture was precisely introduced into Continental European law after the fourth Lateran council in 1215 as a strategy for exorcising the fallacies of human judgment from the legal procedure.[134] While the notion of a science of torture thus can be traced back at least to the Middle Ages, modern American torture has its roots in research done by the CIA and the Army in a period stretching from the late 1940´s to the early 1960´s.

In the late forties and early fifties, the U.S. security establishment found itself facing at least three great shocks: first, the deciphering of a large amount of Soviet wartime communication—a decryption effort known by the name *Venona*—which led to the discovery of an extensive network of Soviet spies planted deep in the most vital tissue of U.S. government;[135] second, the surprise crossing of the Yalu River by Chinese forces during the Korean War;[136] and, third, a series of surprising public confessions to villainy and treason by prisoners of the Soviet bloc, starting with Hungarian Cardinal Joseph Mindszenty's statements during his 1949 trial (Marks, 23) and culminating with Marine Colonel Frank S. Schwable's public denouncements of the United States on Radio Peking in February 1953 (McCoy, 58). All of these events were taken as signs that the U.S. intelligence community still had a lot to learn from their Soviet counterparts, and looking back, this was in no way strange: the U.S. was still very much the new kid on the block when it came to matters of intelligence, and at the outbreak of

134. The introduction of judicial torture was connected to the introduction of Roman law and the abolishment of older forms of law on the Continent in the twelfth century, affecting in the words of Edward Peters a "revolution in law and legal culture" (Peters 40). The older system had relied on tests and on perceived divine intervention while the new system was based on the public trial of and by mortals. Such a sudden transition was dramatic; for, as John Langbein writes, "[h]ow could men be persuaded to accept the judgment of professional judges today, when only yesterday the decision was being remitted to God?" (Langbein 6) The answer to this question was the development of an intricate system of proofs, the so-called "statutory system of proofs" (Langbein 3). This system was developed precisely to have what we could call a "scientific" counterpoint to the subjective interpretations of the judiciary by "eliminat[ing] . . . judicial discretion" (ibid.) through the use of torture to force out confessions.

135. See Thomas Powers' brilliant combined essays and book reviews *The Plot Thickens* and *Spy Fever* from his *Intelligence Wars* (pp. 81-122) for a fascinating exposition of *Venona* and the hunt for spies in the forties and fifties. For a government account of *Venona*, see the NSA's *The Venona Story*, accessible at https://www.nsa.gov/about/_files/cryptologic_heritage/publications/coldwar/venona_story.pdf

136. See David Halberstam: *The Coldest Winter* (2008).

World War II there simply existed no central American intelligence unit. Only on the advice and with the support of their British allies did the U.S. start its "Office of Strategic Services," a precursor organization to what in 1947 would become the CIA.

From an intelligence point of view, especially the shocking confessions of men of perceived integrity and strong pro-western propensities in the countries newly annexed into the Eastern Block seemed to confirm widely held believes that the Communists had somehow been able to crack the code of the human mind – that the Soviets, in a word, had learned *brainwash*. The idea that the Communists had perfected the dark arts of brainwash to an extent where they could take complete control of a subject's mind may today seem the stuff of James Bond movies, but in the late forties and early fifties it was nothing if not a real concern; Cardinal Mindszenty had, after all, confessed his plans to steal the Hungarian Crown Jewels and to start World War III, confessions of such absurdity that they could only come from a mind that had been (re)programmed extensively by Pavlovian technologies of torture and control.

But the outlandish ideas about brainwash did not remain mere speculation; the fear that the Soviets had developed technologies able to crack the human mind were explored in a series of serious reports and studies, among others one done by Yale professor in psychology Irving Janis in 1949 with the title "Are the Cominform Countries Using Hypnotic Techniques To Elicit Confessions in Public Trials?"[137] In this report, Janis takes seriously the possibility that the Soviets were using advanced forms of hypnosis to prime subjects before trial in a way that would make them confess to crimes they had not even thought of committing, let alone had in fact committed. The gist of Janis' report is that hypnosis cannot directly make people do things that are against their very nature, but that this shortcoming of hypnosis can be used to the hypnotist's advantage by implanting the *guilt* of nature-adverse actions into the subjects, thereby readying them for confession. Instead of going the direct way, hypnosis, according to Janis, might therefore go the indirect way by disturbing the mind with dreadful images, subsequently offering a release from the unpleasantness of these images through a confession in a (mock-) trial.

The visceral relief experienced by the subject also explains, writes Janis, the "non-automaton behavior of the hypnotized person" (Janis 6), i.e. the fact that the person confessing does in fact not seem hypnotized, but fully conscious. The psychology suggested by Janis, then, is more complicated than that of age-old ideas about controlling another person's mind through the implantation of actual

137. Janis' report was commissioned by the RAND Corporation and can be downloaded from the organization's website at http://www.rand.org/content/dam/rand/pubs/research_memoranda/2006/RM161.pdf

commands in his psyche; instead, Janis seems to suggest that a series of negative feedback loops can be created through hypnosis, and that these feedback loops will eventually elicit or make it easier to elicit false confessions. Significantly, Janis' main interest is not in the veracity of the confessions or the value of the information that came out during the mock-trials for both were considered so ludicrous as to be evidently fake. Instead, Janis's interest centers on the possibility of *control* and on a type of control that apparently still lets the controlled subject interact as if he or she were in full possession of his or her faculties and agency. Hypnosis, in other words, is not a potentially dangerous science because it can force out information, but because it makes possible to control specific, individual subjects and their actions, becoming a way to realize the putative communist project of total control through "science".

Just two years before Janis' text was written—in the summer of 1947 (Galison, 232)—Norbert Wiener had coined the term "cybernetics" to describe a system that, among other things, was "self-correcting" – a system, that is, which can register its own movements and correct these same movements to retain some sort of status ("homeostasis" in the language of cybernetics) or to reach some sort of goal. The main reason for Wiener to work on this specific type of system was his experience of the massive German bombing raids over England in the beginning of the war; here he had seen the difficulties that ground-based anti-aircraft cannon faced when trying to hit highly maneuverable airborne targets in high motion. In describing the cat-and-mouse game between pilot and anti-aircraft gunner, he turns to notions of the subject that come surprisingly close to the problems of Janis' hypnotist:

> [T]he pilot behaves like a servo-mechanism, attempting to overcome the intrinsic lag due to the dynamics of his plane as a physical system, in response to a stimulus which increases in intensity with the degree to which he has failed to accomplish his task. A further factor of importance was that the pilot's kinaesthetic reaction to the motion of the plane is quite different from that which his other senses would normally lead him to expect, so that for precision flying, he must disassociate his kinaesthetic from his visual sense (as quoted in Galison, 236).

The challenge of the pilot is not just to avoid being hit by anti-aircraft cannon through direct evasive maneuvering. Instead, Wiener invites us to think of the pilot as part of complex assemblage of various sense impressions and temporal latencies that he, in order to beat the anti-aircraft guns, can only overcome by constantly adjusting his course through movements that may, in fact, seem counter-intuitive. Important to note is therefore how the human subject—the pilot—is perceived as a sort of

machine whose tasks of adjustment and steering are inseparable from the machine that he is supposed to steer, not in the sense that the pilot relies on a machine, but in the sense that man and machine, in essence, work according to the same logic.

Wiener therefore effectively attempts to dissolve the distinction between man and machine,[138] suggesting that both function according to the same intricate patterns of adjustment and readjustment, and that these pattern consist of a complex system of feedback-loops that closely resembles those suggested by Janis to make the hypnotized subject confess. With the, at the time, dominant idea that a human being can be understood as a machine comes the idea that a human being can also be *manipulated* like a machine; that the human being, in essence, is nothing but a machine that can be cracked through, in the words of Eden Medina, the "interdisciplinary science of communication and control" that is cybernetics (Medina, 2). Again, we see in Medina's definition of cybernetics that the focus is on control *through* information, not on information as such.

While the notion of the human mind-machine and the suspicion that the Soviets had cracked the code to the mind-machine was a fearful prospect indeed, the Chinese crossing of the Yalu River during the Korean War seemed to represent another dreadful aspect of the Communist Block – the swarm-like masses of its soldiers whose numbers far superseded anything the U.S. or the West could offer or even potentially draft. When describing what they saw, the soldiers of the Korean War turned to striking imagery of swarms, of wheat fields, and sometimes even of magic: "They came, and they came, and they kept coming. There seemed to be so many of them and they just kept coming, nothing stopped them, there were always more of them and it was as if we might as well not have been there, that what we did just didn't matter" (Halberstam, 278); "Davis had never seen anything quite like this. When the Americans sent up flares, Davis, who had grown up on a farm in upstate New York, saw so many enemy soldiers that he was reminded of nothing so much as wheat waving in a field back home"' (ibid., 36); "To the American watching from the hills surrounding the village it was, as one American soldier said, like 'kicking an Anthil'" (ibid., 584); "Extremely able troops from a brand-new enemy had shown up on the battlefield, fought well, and then had seemingly 'vanished from the earth'" (ibid., 44).

So not only had Communists potentially cracked the code to complete control of the human mind; the number of human mind that could be controlled by this "science" was so great that they seemed to the U.S. soldiers to represent something entirely strange and almost supernatural. What is

138. As Eden Medina describes it in his fascinating account of Chilean cybernetics, cybernetics was the "postwar science of communication and control" which "looked for commonalities in biological, mechanical, and social systems" (Medina, 2)

interesting in these testimonies is that while the choice of imagery stems from the world of nature, the resulting impression of reading the testimonies seems in fact more mechanical than organic; it is as if the specific metaphors (waving wheat fields, ants) connote something, to use a paradoxical compound, *organic-mechanic* – as if the metaphors teeter on the same tightrope as the word "drone," which, as we know, is both a worker bee and an unmanned aerial vehicle. We, in other words, not only see the human-machine equalization theorized by leading cyberneticians of the time, but also by common soldiers in their descriptions of their ordeals during the Korean War.

Also joining together the mechanical and the organic into one spectacular assemblage, journalist and covert CIA-propagandist Edward Hunter described in an article from September 1950 in the *Miami News* in which he coined the term "brainwash"[139] how the Eastern Block could:

> Put a man's mind into a fog so that he will mistake what is true for what is untrue, what is right for what is wrong, and come to believe what did not happen actually had happened, until he ultimately becomes a robot for the Communist manipulation (as quoted in Marks, 133).

The human as a robot that could be manipulated by the advanced mind control of the Communists, and a mass of these manipulated humans-cum-machines as a swarm of Communist robots that, as a tidal wave, would overrun the free world. Such was the prospects of the combined shock of discovering that the human being was in fact nothing but a mechanical device ready for manipulation, and that the Eastern bloc had not just divisions or armies, but literally *fields* of such manipulated individuals, ready to pounce.

Peeling the Artichoke

Behind the scenes, the CIA was working overtime to develop defensive capabilities against the perceived mind control skills of the Communists, and on April 20 1950 the first in a line of CIA

[139] John Marks describes how Hunter "made up his coined word from the Chinese *hsi-nao*—'to cleanse the mind,'" even though the term had "no political meaning in Chinese" (Marks, 133).

projects was formed under the name of "Project Bluebird" with this purpose.[140] Project Bluebird officially consisted of a number of interrogation teams that were to polygraph CIA employees in order to prevent enemy "penetration" of the organization, but in reality Project Bluebird was a peculiar mix of conventional methods for interrogation, and research into a plethora of outrageous techniques such as the use of drugs, electroshocks, and even "neurosurgical techniques"—a euphemism for lobotomies—as possible tools in the war against the Soviet Block.

Many of the most outlandish experiments were not performed by CIA agents themselves, but by scientists at various universities who, authorized by then director of the CIA Roscoe Hillenkotter, were financed through unvouchered government funds (Marks, 24).[141] Common to these projects was a desire to engineer ways to control "an individual to the point he will do our bidding against his will and even against such fundamental laws of nature as self-preservation" (ibid., 25), a goal that seems to stretch Irvin Janis' speculations on hypnosis even further than the Yale professor thought possible. The decisive question for the CIA, then, was still the control of individuals, rather than the procurement of information, and this is indeed not strange; in the battle over the hearts and minds of a decolonized world between the two great superpowers, control and manipulation was as great an asset as that of pure, raw quantities of information. We see, therefore, that these studies and the motives with which they were performed differed markedly from those of the U.S. torture regime: the point was precisely to gain the *control of designated individuals*, i.e. torture was precisely a tool with which to produce or mediate a relation between people, and not a tool to procure growing quantities of information.

During the next couple of years, Bluebird changed name to Artichoke, a name that holds eerie connotations to the act of peeling off layers of a person's psyche until the soft, malleable heart of the

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140. The first CIA project—Bluebird—appears as the perfect name for a "defensive" project against the evil science and organico-mechanical hordes from the East; with its strong blue-red-white colors, the Bluebird lends to the imagination images of an American flag soaring the skies, almost as if Stars and Stripes itself has taken to the air, gliding vigilantly through the clouds, guarding the territory, on the lookout for the enemy. Not only visually, but also behavior-wise the Bluebird is a perfect totem animal for this project: According to a guide on North American birds, it is "territorial and prefer open grassland with scattered trees." It would seem, then, that the Bluebird lives like an American frontier farmer, protecting its grasslands, chopping down forests whenever possible, always ready to strike incoming foes. What is more, this same bird-guide says that, "Of all the birds a gardener could choose to attract, the bluebird is the quintessential helpful garden bird. Gardeners go to extreme lengths to attract and keep them in the garden for their advantageous properties. Bluebirds are voracious insect consumers, quickly ridding a garden of insect pests." The biblical plague of the locust swarm thus finds its fiercest enemy in the real bluebird, and the geopolitical plague that is the swarm of Communist soldiers finds its fiercest enemy in the project that takes its name after this bird – CIA's Project Bluebird. The bluebird, in other words, is the perfect image of conventional geopolitical dominance: The vigilant eye in the sky that surveys, governs and protects the territory, but, from its place high in the sky, may not be able to notice intruders that are less obvious or choose to move only in "the fog," a skill Edward Hunter so eloquently ascribed to the communist adversary.

141. See Alfred McCoy *Torture and Impunity* for further elucidation on the connection between academia and the CIA in the fifties

person can be reached.[142] If the name changed, the experiments proceeded and they did increasingly so by using subjects that had not signed up voluntarily as guinea pigs, but who were tricked into participating or who had been caught in the murky world of intelligence and found expendable.

Moreover, the CIA were not the only U.S. site of experiments; also the U.S. Navy had a program called "Project Chatter" with which the CIA agents from Project Artichoke eventually teamed up in Germany in the summer of 1952, not least because the Navy needed live human test subjects for their tests which the CIA promised to bring. We will not go into the content of the experiments here, but just mention that it was such a blatant failure that the Navy shut down Project Chatter for good. However, within the CIA the secret research on mind control continued with the 1953 establishment of the so-called "MK-ULTRA," the most ambitious of the CIA programs in the fifties which would carry on the legacy of Projects Bluebird and Artichoke.

The name MK-ULTRA at first sounds a lot less charming and more random than Bluebird or Artichoke, but this first impression is somewhat misleading: While MK is a code name for the department within the CIA that led the research, the "ULTRA" part is hard to read as anything but a deliberate nod of the hat to British efforts to break the German Enigma code during the Second World War, efforts which also went by the code name *Ultra*. These efforts had the brilliant mathematician Alan Turing as one of its central actors, the same Turing who would later develop the so called "Turing Test" which to this day remains one of the most important contributions to the study of artificial intelligence. Again, we see direct thematic and material links between the fields of computer/human-integration, the intelligence efforts of the US, and the more general cybernetic movement towards a purely mechanical or computational notion of the human subject.

142. Not surprisingly, an artichoke was also Freud's favorite vegetable, and in his famous "Interpretation of Dreams" he has two fascinating descriptions of why that is: "I had been five years old at and my sister not yet three; and the picture of the two us blissfully pulling the book to pieces (I should add, like an *artichoke*, leaf by leaf) (Freud, 196) . . . But the copious and intertwined associative links warrant our accepting the former alternative: cyclamen -- favourite flower -- favourite food -- artichokes; pulling to pieces like an artichoke, leaf by leaf" (ibid., 213).

The analogy between artichoke consumption and the psychoanalytical praxis is pretty straightforward in its almost vulgar allusion to the peeling off of the layers of the person in order to gain access to the knowledge and truth about the inner workings of the psyche. Project Artichoke, then, seems to be a step away from the classical geopolitical territoriality of the bluebird and mark a foray into some sort of pscyho-territorial warfare; a type of warfare in which the vertical birds-eye view of the guardian in the sky has been replaced with the micro-management of the subject itself.

A Gift for the Future

It is well beyond the scope of this dissertation to tell the whole history of CIA and Army sponsored torture experiments in the fifties, interesting and shocking as it is; we should only note that the Wild West-period of the CIA and Army experiments did not survive the fifties, and that even at its apex more sober voices expressed grave concerns that the data on the Soviet on which the CIA based its fear and its experiments were "extremely poor" and based on "second- or third-hand rumors, unsupported statements and non-factual data" (Marks, 31). Overall, the whole narrative would probably be a part of history's horror cabinet if not for the fact that it resulted in two events that would end up having a lasting effect on U.S. torture practices: the 1963 CIA KUBARK Counterintelligence Interrogation Manual and the establishment of the SERE (Surivival, Evasion, Resistance, Escape) program in 1955.

The KUBARK manual[143] is a 128-page document which refers back to much of the outsourced CIA research into mind control done in the fifties, most prominently to the work done by Lawrence Hinkle at Cornell Medical Center and by Donald Hebb at McGill University. The manual explicitly states that it is "based largely upon the published results of extensive research, including scientific inquiries conducted by specialists in closely related subjects" (KUBARK, 1).

The manual, then, is undoubtedly tinged with a scientific veneer, but it is so in a consistently pragmatic way; the first line of the manual thus states that "[t]his manual cannot teach anyone how to be, or become, a good interrogator. At best it can help readers to avoid the characteristic mistakes of poor interrogators," (ibid) and, as if to underline this, goes on to add that "[t]here is nothing mysterious about interrogation . . . [a]s is true of all craftsmen, som are more able than others." From this opening, eighty or so pages of the manual go on by describing the general stages of an interrogation, how to set the scene for successful interrogations etc., various more or less (often less) intricate psychological tricks and ruses, giving each of the latter rather laughable names such as "Ivan is a dope," "The Wolf in Sheep's Clothing," and "Spinoza and Mortimer Snert."

Around page eighty, the manual starts going into "The Coercive Counterintelligence Interrogation of Resistant Sources," starting out with the following paragraph:

> The purpose of this part of the handbook is to present basic information about coercive techniques available for use in the interrogation situation. It is vital that this discussion not be

[143] The KUBARK manual can be downloaded from the National Security Archive's webpage at http://nsarchive.gwu.edu/nsa/the_archive.html

> misconstrued as constituting authorization for the use of coercion at field discretion. As was noted earlier, there is no such blanket authorization (KUBARK, 82, underlining in original).

We will leave the obvious question of why the CIA would produce a guide for torture if they did not intend for it to be used to another investigation, and instead focus on a couple of key points from the KUBARK's extensive list of coercive measures which in total contains the following ten points: arrest, detention, deprivation of sensory stimuli through solitary confinement or similar methods, threats and fear, debility, pain, heightened suggestibility and hypnosis, narcosis, and induced regression (KUBARK, 85). While all of the techniques these points cover (apart from hypnosis) have been used routinely by U.S. forces, there are two points of special interest to an investigation of the U.S. torture regime: sensory stimuli and pain, two techniques which historian Alfred McCoy in his book *Torture and Impunity* identify as those that ended up forming the core of the KUBARK manual and whatever involvements with torture the U.S. would have up until the present day.

While "pain" seems a pretty straightforward category within a genre such as torture, the main point of the KUBARK manual is to introduce a *certain* type of pain, namely what McCoy calls *self-inflicted* pain:

> It has been plausibly suggested that, whereas pain inflicted on a person from outside himself may actually focus or intensify his will to resist, his resistance is likelier to be sapped by pain which he seems to inflict upon himself. 'In the simple torture situation the contest is one between the individual and his tormentor . . . When the individual is told to stand at attention for long periods, and intervening factor is introduced. The immediate source of pain is not the interrogator but the victim himself' (KUBARK, 94).

Self-inflicted pain—induced for instance by making people stand or sit in highly uncomfortable positions for prolonged periods—gives the subject the sensation that his torments stem from his own body and not from his interrogator, thus breaking his resistance more effectively than the "contest . . . between the individual and his tormentor." It moves the subject towards a constant attempt to adjust his or her self in ways that will stop the pain, ultimately by telling the torturer what he or she wants to know. In the idea of self-inflicted pain we find a parallel to the need of the anti-aircraft gunner to persistently correct his aim to hit the hostile bomber through a series of feedback loops as theorized by

Norbert Wiener and as pioneered for interrogation purposes by Yale professor Irvin Janis in his text on hypnosis.

Sensory deprivation—achieved today through a variety of known techniques ranging from hooding and gloving over confinement in glaringly light or pitch dark rooms to subjecting people to extremely loud volumes of noise or music—was originally a specialty of Donald Hebb, distinguished professor in psychology at McGill and later the head of the American Psychiatry Association, who, with substantial financial backing from the CIA, performed a series of experiments that showed how surprisingly fast a subject would break down if deprived of all sensory stimuli. KUBARK describes the effects of sensory deprivation as "superstition, intense love of any other living thing, perceiving inanimate objects as alive, hallucinations, and delusions" (ibid., 88), and adds that "[a]n early effect of such an environment is anxiety" (ibid., 90). Supposedly, sensory deprivation—along with the other techniques described in the section on coercion—have the effect of inducing "regression" in the victim, meaning that the "interrogatee's mature defenses crumbles [sic] as he becomes more childlike. During the process of regression the subject may experience feelings of guilt, and it usually useful to intensify these" (ibid., 103.) Most importantly, however, we recognize the double onslaught of self-inflicted pain and sensory deprivation as the go-to techniques of the U.S. torture regime in the War On Terror, and see that they indeed have a long, "scientific" history within the CIA.

There are at least three important things to note concerning this duo of torture techniques: First, and perhaps most importantly, they leave very few traces on the bodies of the victims, thereby making them the perfect "clean tortures;" second, they are more than a step removed from many of the outlandish techniques of the fifties while still aspiring to be thoroughly "scientific" in their methods and claims; and, third, they represent an ontology of the human subject that conflates first generation cybernetics—where notions of the feedback-loop were the most prominent idea—with second generation cybernetics, characterized by an increasing awareness of the relation between the mind and and the environment.[144] Not surprisingly, in the very language of the KUBARK manual we find the language of cybernetics employed when it argues that "[r]elatively small degress of *homeostatic* derangement . . . pain" (ibid., 83, emphasis added) may make the victim talk; the connection between ideas about the human mind in cybernetics and ideas about how to break down the human mind in the CIA's torture program basically revolve around the same concepts. Again, we see how torture comes to

144. For a short introduction to the history of cybernetics see N. Katherine Hayles *Cybernetics* in *Critical Terms for Media Studies* (Mitchell and Hansen (red.), 145-55).

correspond to and, in a sense, be produced by specific ways of perceiving the world and the human beings that inhabit this world.[145]

Yet, for our present purposes the by far most important take-away from the KUBARK manual is the way it describes the motives behind and limitations to its list of coercive techniques:

> Psychologists and others who write about physical or psychological duress frequently object that under sufficient pressure subjects usually yield but that their ability to recall and communicate information accurately is as impaired as the will to resists. This pragmatic objection has somewhat the same validity for a counterintelligence interrogation as for any other. But there is one significant difference. Confession is a necessary prelude to the CI [counter-intelligence] interrogation of a hitherto unresponsive or concealing source . . . He does not need full mastery of all his powers of resistance and discrimination to know whether he is a spy or not (KUBARK, 84).

Torture, then, does not generally work, but *might* work if the only point is to make a subject confess to being a spy, after which normal interrogation can proceed. In the KUBARK manual, for all its disgusting brutality and the even more disgusting brutalities it would inspire,[146] it is recognized, then, that torture only functions as a way to reach one specific breaking point, a breaking point that precludes the procurement of any other information than the fact that a person is a spy for the Soviet or the Chinese:

> What is fully clear, however, is that controlled coercive manipulation of an interrogatee may impair his ability to make fine distinctions but will not alter his ability to answer correctly such gross questions as 'Are you a Soviet agent? What is your assignment now? Who is your present case officer?' (ibid.)

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145. Sadly, due to limitations on space, we cannot go further into this fascinating connection, but during my work with popular cultural fictions on torture, it became clear that a strong link between ideas about torture and ideas about human/machine-integration still exists; in a TV show like *Battlestar Galactica* and a movie like *Impostor* we are thus presented with the torture of androids—sentient, human-looking machines—and all the dilemmas this entails.

146. The techniques described in the KUBARK manual—and a plethora of adaptations or improvisations based on them—came to form the backbone of American torture during the Vietnam War (the so-called "Phoenix Program") and the aforementioned torture education offered to various Latin American dictatorships as part of U.S. counter-insurgency support in the seventies and eighties. Most importantly, KUBARK was the blueprint for another torture manual, the 1983 *Human Resource Exploitation Manual*, which became the subject of huge scandal when the Baltimore Sun in 1997 through a Freedom of Information Act succeeded in getting it released. The *Human Resource Exploitation Manual* parrots much of what was already written in the KUBARK, showing a basic continuity in the CIA's approach to torture (McCoy, 233).

The idea that torture can provide a steady river of information, then, is clearly discarded. Torture's only potential use for an interrogation is to make a designated person, a person who is specifically suspected of being a spy, confess and thereby pave the way for normal "CI" (counterintelligence) interrogation. So torture can be used to force out a confession, and that is basically it, and the "science" of torture was once again reduced to its pre-Enlightenment version where its prime objective was indeed to force out confessions. More intricate pieces of information must be procured using ordinary interrogations once the subject has confessed to actually being a spy.

KUBARK, then, suggests the use of torture only in order to breach one specific threshold, namely that of confession, and the putative "science" of torture in this framework becomes a technique with which to install a "regression" in a specific victim with the purpose of doing exactly that. The faith in a techno-scientific approach to torture is definitely present, but it is precisely so in the shape of an approach which at its most basic mediates a basically "social relation" of "men one to another," as Luckacs would have it, namely a relation in which the (CIA) interrogator wants to *reveal* something about this other person with which he can turn him into an "enduring asset" (KUBARK, 102) or the source of the exploitation of a specific piece of information, namely whether the person is a spy or not.

While the CIA's KUBARK manual and torture manuals it spawned were explicitly offensive in their intentions, SERE was created as a program within the U.S. Army with strictly defensive purposes, at least on paper. Since the aforementioned shock of seeing U.S. servicemen denouncing their home country during the Korean War, a number of cadets, from all branches of the armed forces have undergone training in resisting various torture techniques under a highly controlled exercise environment in a program that exists to this very day. Even though all soldiers involved know very well that SERE training is pure simulation, the tortures used during training have often been so severe in their effects that soldiers have been known to break down, making the SERE program not only the most realistic counter-torture program, but also the optimal lab for developing actual torture techniques by monitoring their effects on live subjects. If a person breaks down even though he or she is well aware that his ordeals are part of nothing but a huge role-playing game, there can be no doubt as to the efficacy of these same techniques when used on a subject who is in fact a prisoner of war and at the true mercy of his or her interrogators.

When the secret investigation into mind control and torture done by MK-ULTRA were more or less discontinued in the early sixties, the SERE program became the new site for an even more hands-on way of gathering knowledge on what it takes to break the human mind. And once again, the

techniques used at SERE ring eerily familiar to a post-9/11 ear: waterboarding, sleep deprivation, isolation, bombardment with agonizing sounds, sexual and religious humiliation, and subjection to extreme temperatures (Mayer, 161). Not only do these techniques form the core of American torture regime in its "legally" sanctioned versions practiced at Guantanamo and various other islands in the U.S. torture archipelago, but they also seem to be more or less anti-septic versions of the "illegal" tortures committed at Abu Ghraib prison where hooding, beating, sleep deprivation, and sexual abuse (including straight-out rape) were among the most used techniques. Further, the tortures that the cadets are subjected to seem to embody perfectly the two basic tenants of post-KUBARK U.S. torture in that most of them (with the salient exception of waterboarding) are built around the two central pillars identified by Alfred McCoy, namely self-inflicted pain and sensory deprivation.

While obviously brain children of the fifties, KUBARK, SERE and their associated notions of what a human subject is and how it is possible through science to manipulate with this subject have to some extent been passed down to the present day from the fifties. Yet, as we shall see, viewing the use of these techniques today (either as they have been handed down informally or actually been ordered) as a direct extension of the climate in which they were conceived would be an anachronism. Both KUBARK and SERE were developed in order to combat a specific threat, namely the prospect of a communist breakthrough in mind control, and as absurd a defense for researching torture as this seems (and is) it nonetheless represents a different sort of absurdity than the one represented by the post-9/11 U.S. torture regime. The techniques, even if the overall principles behind them may seem identical, are embedded in radically different legal-ontological and epistemological regimes, and if we do not constantly keep that in mind, we once again run the risk of being blind to the particularities of the U.S. torture regime.

Specters of the Past

In March 2002, roughly fifty years after the start of Project Bluebird, FBI agent Ali Soufan—one of the bureau's foremost experts on Islamic radicalism and terror at the time—receives a call from a colleague ordering him to go to Pakistan to assist in the interrogation of Abu Zubaydah, an Al Qaeda affiliate who was "one of the most important cogs in the shadowy network that we were struggling to disrupt" (Soufan, 374). Zubaydah had been caught in a March 28 joint FBI and CIA raid on a building in Faisalabad, Pakistan, and had been shot in the testicles, the thigh, and the stomach in the ensuing gunfight, after which he was taken to a black site in Thailand (Siems, 46). On the two pictures that exist

from the night of his capture, one can see "two parallel, curving trails of blood leading into or out of a doorway," and, on the second, "Zubayda in the bed of a pickup truck, head on the tailgate, clean-shaven and wildhaired, obviously gravely wounded" (Siems, 47). The wounds Zubaydah had suffered were so severe that a makeshift hospital room had to be installed in the safe-house where Soufan were to question him, and even then he was close to dying several times.

In his highly redacted memoirs of his time with the FBI and his efforts in the war against terror, Soufan describes how his interrogation of Zubaydah—although challenged by Zubaydah's condition—yielded surprising amounts of information – surprising amounts, that is, for anyone unfamiliar with how effective non-coercive interrogation in fact is. For those in the know, it should come as no surprise that a trained interrogator as Soufan with an intimate knowledge of the culture, history, language, religion, and personal biography of the person he interviewed would be more than able to extract vital information.[147] For the CIA, however, the fact that Soufan could get any information out of this key individual without torturing him came as a surprise – especially seeing as the CIA had already "commissioned a report in December 2001 from two psychologists who argued that an approach that used cruelty and humiliation to subdue terrorists would be needed to make high-value detainees talk, and that the process took time" (*Committee Report*, 378).

If Cheney was the patriarch of the dark side, the two psychologists mentioned in this quote were his handmaidens, playing the arguably most decisive role in the practical set-up and fast proliferation of the U.S. torture regime. These two men—often mentioned by their cover names—weave in and out of various testimonies, histories, and documents from the period, appearing to hover in the background of almost every torture prison or session. In the Committee Report they are mentioned as DUNBAR and SWIGERT and Ali Soufan only knows SWIGERT under another alias, "Boris," but they have since been identified as two retired SERE instructors, Bruce Jessen and James Mitchell (Mayer, pp. 156 & 163). According to sources in the intelligence community, Jessen and Mitchell were "clean-cut, polite Mormons" who were "prepared to do whatever it takes" (Mayer, 163).

Religious affiliation and appearances aside, none of them had any real experience with interrogation, let alone any specific knowledge of the socio-cultural particulars of Islamic radicalism (they did not even speak Arabic), but they were nonetheless treated as gurus in the dark arts of interrogation, beginning their highly lucrative stint as hired torture contractors to the CIA with the

147. Even among his trained FBI colleagues, Soufan stood out; Philip Zelikow of the 9/11 commission went so far as to call him "one of the most impressive intelligence agents—from any agency" that the commission had come across (as quoted in Siems, 47).

interrogation of Abu Zubaydah.[148] In the Senate Committe Report, we get an insight into DUNBAR and SWIGERT's importance for the set up and proliferation of torture:

or after, the interrogation of Abu Zubaydah. The CIA's June 2013 Response states that the Committee Study was "incorrect… in asserting that the contractors selected had no relevant experience." The CIA's June 2013 Response notes SWIGERT and DUNBAR's experience at the Department of Defense SERE school, and SWIGERT's "academic research" and "research papers" on "such topics as resistance training, captivity familiarization, and learned helplessness - all of which were relevant to the development of the program." The CIA's June 2013 Response does not describe any experience related to actual interrogations or counterterrorism, or any relevant cultural, geographic, or linguistic expertise. The CIA's June 2013 Response provides the following explanation: "Drs. [SWIGERT] and [DUNBAR] had the closest proximate expertise CIA sought at the beginning of the program, specifically in the area of *non-standard means of interrogation*. Experts on traditional interrogation methods did not meet this requirement. Non-standard interrogation methodologies were not an area of expertise of CIA officers or of the US Government generally. We believe their expertise was so unique that we would have been derelict had we not sought them out when it became clear that CIA would be heading into the uncharted territory of the program" (italics and emphasis in original). As noted above, the CIA did not seek out SWIGERT and DUNBAR after a decision was made to use coercive interrogation techniques; rather, SWIGERT and DUNBAR played a role in convincing the CIA to adopt such a policy.

~~TOP SECRET//[redacted]//NOFORN~~

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(*Committee Study,* 32)

This footnote is as strange as it is remarkable; first, it states clearly and in plain English what we already knew, namely that neither SWIGERT nor DUNBAR had any actual experience with interrogations. It then adds, however, that it would nonetheless have been irresponsible not to use their "academic research" into "learned helplessness" to aid the CIA when they "headed into the uncharted territory of the program." We immediately see both the connections with and the disconnections from the above described torture of the fifties. Their ideas about learned helplessness appears taken from or at least strongly inspired by the KUBARK's ideas about "regression" to a "childlike" state in which the victim will succumb completely to the dominance and demands of his torturer, and if the CIA wanted this sort of "expertise" they could have just perused their own archives and found the KUBARK manual. Yet, the idea is no longer linked to a distinct and isolated step in a counterintelligence operation (making a person confess to being a spy,) but instead to the idea of "uncharted territory."

The idea of an uncharted territory seems yet another version of the dark side which is dark precisely because it remains radically uncharted. The connections between this dark side and torture are not presented as contingent but as essential; "we would have been derelict had we not sought them out" as the CIA responded, thereby indicating that due to the very nature of the "uncharted territory" it would not only not have been advisable to proceed without the help of torture, but even dereliction of

148. "As noted above, the CIA did not seek out SWIGERT and DUNBAR after a decision was made to use coercive interrogation techniques; rather, SWIGERT and DUNBAR played a role in convincing the CIA to adopt such a policy" (*Committee Study*, 32).

duty had they gone at it without the help of DUNBAR and SWIGERT. DUNBAR and SWIGERT's scientific torture, then, is viewed by the CIA as an invaluable resource to map a completely uncharted world in which even enemies are shrouded in complete darkness; torture is a cartographic technique with which to acquire information about the dark side, and it is arguably even presented as the *only* technique.

The fact that the CIA's statement refers so explicitly to the "beginning of the program" is a testimony to how dominant the idea of the dark side was from the very outset, but also to what we already argued: the quantifying axiomatic of information and torture as the essential way with which to procure this information was not something that developed slowly and organically from real experiences with recalcitrant detainees. Instead, it followed immediately and inevitably from the very bipolar world set up by Bush and Cheney; from deterritorialization follows immediate axiomatization.

The strong, yet unsubstantiated claims to the scientific achievements of DUNBAR and SWIGERT and the shocking fact that the men single-handedly managed to convince the CIA that a torture program was necessary by pointing to their "scientific" achievements does indeed showcase the links between the overall notion of the dark side and specific notions of the role that "science" would play in the approach to this dark side. On the chaotic, uncharted dark side where all meaning has been lost to the very deterritorialization that comes with viewing it as an "uncharted territory" or a dark side, and not as an ordinary battlefield or intelligence operation, science is not just an "index of social production," as Deleuze and Guattari would have it, for any idea about the social (in the very broad sense of this word) has been liquefied. Instead, science and the information which it can produce becomes the sole lens through which the world can be seen and organized; science seems not to be a technique so much as something that emanates as an imperative from the very nature of the dark side itself.

However, DUNBAR and SWIGERT did not only engage with the dark side from behind their desks; in spite of Soufan's highly successful interrogation of Zubaydah, Soufan describes how a CIA team led by SWIGERT swooped in and took control over the interrogation of the high-value detainee:

overcome Abu Zubaydah's resistance to interrogation."[93] SWIGERT had come to [redacted]'s attention through [redacted], who worked in OTS. Shortly thereafter, CIA Headquarters formally proposed that Abu Zubaydah be kept in an all-white room that was lit 24 hours a day, that Abu Zubaydah not be provided any amenities, that his sleep be disrupted, that loud noise be constantly fed into his cell, and that only a small number of people interact with him. CIA records indicate that these proposals were based on the idea that such conditions would lead Abu Zubaydah to develop a sense of "learned helplessness."[94] CIA Headquarters then sent an interrogation team to Country [redacted], including SWIGERT, whose initial role was to consult on the psychological aspects of the interrogation.[95]

(*Committee Study*, 26)

The *Committee Study* does not go into great detail about the interrogation of Abu Zubaydah prior to SWIGERT's take-over, but we know from Ali Soufan that he presented himself as "Boris," yet another *nom de plume* of James Mitchell who apparently was not interested in being identified even by those who were his putative allies in the War On Terror.

In his memoirs, Soufan describes his bafflement and frustration over having to hand over his successful interrogation to a person with no experience in interrogation and, even more importantly, no knowledge on what actually drives terrorists like Abu Zubaydah, crucial knowledge for any successful interrogation of a prisoner (Soufan, 395). However, when presented with Soufan's critique, "Boris" answered that "This is science," and that 'You'll see . . . It's human nature to react to these things. You'll soon see how quickly he folds" (ibid.).

Two Torture Regimes

The general picture that the *Committee Study* paints of the relation between the FBI and the CIA is largely congenial with Soufan's account, but it adds important details on how the CIA and their contractor SWIGERT presented much of the information that Zubaydah had divulged to Soufan during standard, non-coercive interrogations as results of their own "scientific" approach and thus as a testimony to the efficacy of their newly conceived torture program. Of course, at least SWIGERT must have known that this was not the case and that whatever information he had to show for his efforts was in fact information he had stolen from Soufan, but he and his superiors nonetheless appropriated the results to garner support for the torture regime.

The treatment which Abu Zubaydah received from SWIGERT can roughly be divided into two stages: a first stage which set in on April 13, 2002 (*Committee Study*, 27), immediately after SWIGERT took over the interrogation from Soufan, but well before the August 1 memo from Bybee which made

actual torture legal; and a second, harsher stage, whose beginning coincided almost to the day with the Bybee memo. The first stage is described the following way in the *Committee Study*:

> (~~TS//~~[redacted]~~//NF~~) A cable described Abu Zubaydah's cell as white with no natural lighting or windows, but with four halogen lights pointed into the cell.[110] An air conditioner was also in the room. A white curtain separated the interrogation room from the cell. The interrogation cell had three padlocks. Abu Zubaydah was also provided with one of two chairs that were rotated based on his level of cooperation (one described as more comfortable than the other). Security officers wore all black uniforms, including boots, gloves, balaclavas, and goggles to keep Abu Zubaydah from identifying the officers, as well as to prevent Abu Zubaydah "from seeing the security guards as individuals who he may attempt to establish a relationship or dialogue with."[111] The security officers communicated by hand signals when they were with
>
> **Abu Zubaydah and used hand-cuffs and leg shackles to maintain control. In addition, either loud rock music was played or noise generators were used to enhance Abu Zubaydah's "sense of hopelessness."[112] Abu Zubaydah was typically kept naked and sleep deprived.[113]**

(*Committee Study*, 28-9)

There are several things of significance in this quote, first of all the fact the, relatively speaking, mild measures taken by SWIGERT which follow from the fact there was as of early 2002 still no legal framework in place that could act as a "golden shield" against prosecution according to U.S. anti-torture law.

Secondly, the techniques in the description all fall into the category of either self-inflicted pain (uncomfortable chairs, shackled legs) or sensory deprivation (loud rock music or noise generators) and were therefore essentially nothing new, in spite of SWIGERT's claims that his approach was state-of-the-art. In fact, if one only judged from the techniques used, SWIGERT might as well have been one of the fringe scientists working for the CIA in fifties even though, as we know, the overall torture regime differed markedly from that of the fifties.

Lastly, the description of the set-up of Zubaydah's cell and the treatment he receives is hard not to read as deliberately playing on the visual make-up of a hospital ward or, even better, a laboratory. From the whiteness of the walls over the sharp light to the curtain that served as a partition between cell and observation, it is as if Zubaydah is a sample of a strange, dangerous resource brought in to be investigated in order to be harvested. Our claim that the dark side existed beyond the rules of language and could only be approached as a resource, as a "body without organs" onto which an information-producing machine could latch on is here confirmed in a brutally visceral way. In this context, the measures taken to prevent Zubaydah from interacting with his guards—the goggles, the boots, the gloves—seem not only to prevent him from recognizing them, but must naturally also have served to

isolate them from him, as if he were in fact a person so contaminated or dangerous that one should not expose even a tiny patch of skin when sharing a room with him.

This duality to Zubaydah's treatment marks a general characteristic of the torture regime as it became permeated by the idea of a dark side which could only be approached through the workings of the quantifying axiomatic of information. Even though SWIGERT came from a job as an instructor in a program which merely *role-played* torture, the qualities (or, rather, quantities) of the dark side made it so that all parties to the torture regime would have to act accordingly; "working the dark side" was no joke, and one had better be prepared for and protected against it. And being protected against it not only meant that the detainees had to undergo sensory deprivation, but that also the guards *themselves* had to be numbed in order to maintain the idea of a dark side in which normal categories of individuality could not be recognized or even thought of.

The fact that no guards could be identified and that communication could happen only through hand gestures also speaks to the idea of a dark side in which human language and individual identity have been liquefied by the quantifying axiomatic of information; the only allowed interaction with the information resource was through that techno-scientific torture which was its only proper science.

While the KUBARK manual brims with meta-reflections on interrogation and coercion (this might work, this might not, one could try this approach or that approach etc.) there were no meta-reflections on the dark side. It is, again, as if these techno-scientific tortures spring from the very fabric of the dark side itself, and as if there are no, to put it metaphorically, "exterior rooms" to the information producing site, but only pure immanence. To work or act on the dark side is categorically to act within a specific techno-scientific paradigm, and to take on fully the role of technician without any left-over agency or questioning.

Even though the techniques used in stage one of Zubaydah's interrogation themselves would qualify as torture, President Bush in 2006, in order to justify the harsher stage two of Zubaydah's abuse, publicly claimed that during the period in question—the period when the CIA took over the interrogation from Soufan—Zubaydah did not divulge enough information, and that he:

> was defiant and evasive. He declared his hatred of America. During questioning, he at first disclosed what he thought was nominal information -- and then stopped all cooperation. Well, in fact, the "nominal" information he gave us turned out to be quite important. For example, Zubaydah disclosed Khalid Sheikh Mohammed –or KSM—was the mastermind behind the

9/11 attacks, and used the alias "Muktar." This was a vital piece of the puzzle that helped our intelligence community pursue KSM.[149]

There is something exceedingly weird about this attempt at lying publicly without really lying. Bush recognizes the progress done by Soufan in his interrogations, but insists on claiming that it was not progress enough to be really deemed successful, at least not successful enough. Also the use of the word “nominal” is odd or, rather, it illustrates Bush's profound ignorance of interrogation matters; for any skilled interrogator, the point is precisely to make the interrogated person think that the things he tells his interrogator are things that the interrogator already knows and that he therefore gives no one up or betrays any cause by just confirming these well-known facts. So Zubaydah’s idea about “nominal” information is completely after the book and proof of Ali Soufan’s interrogation skills; for Bush, it appears as pure coincidence and a proof of the need to start torturing in (more) earnest.

Further, what Bush claims to be a sudden stop in Zubaydah’s cooperation either refers to Zubaydah reacting negatively to the new regime introduced by SWIGERT or to a deliberate 47-day period of complete isolation of Zubaydah. This isolation period again rings strangely “medical,” so to speak; it is as if Zubaydah was quarantined (a word which, in fact, stems from the Italian word for forty, so even the number roughly matches) by SWIGERT and his proselytes in order for them to find out how to best turn up the heat on Zubaydah. The fact that Zubaydah—at that time the most “high-value” detainee of them all—was allowed to rot in his cell for well over a month without any questioning belies any claim on the part of the administration or the CIA that the acquisition of time-sensitive information was at the heart of the torture program; in a situation where the authorities feel that they have the time to safely isolate a key intelligence asset for 47 days, we are as far removed from any “ticking time bomb”-scenario as could possibly be imagined.

The truth of the matter was that SWIGERT and the CIA felt that they needed to radically escalate the coercion already in place, an escalation which was needed due to the fact that Zubaydah apparently did not provide enough information:

149. The White House. “President Discusses Creation of Military Commissions to Try Suspected Terrorists.” September 6, 2006. http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html

training, and tactics.[131] As described in more detail in the full Committee Study, Abu Zubaydah's inability to provide information on the next attack in the United States and operatives in the United States served as the basis for CIA representations that Abu Zubaydah was "uncooperative," as well as for the CIA's determination that Abu Zubaydah required the use of what would later be known as the CIA's "enhanced interrogation techniques" to become "compliant" and reveal the information the CIA believed he was withholding. Abu Zubaydah never provided this information, and CIA officers later concluded this was information Abu Zubaydah did not possess.[132]

(*Committee Study*, 31)

Zubaydah, then, was patient zero in this techno-scientific paradigm, the person around whom "what would later be known as the CIA's 'enhanced interrogation techniques'" was built. Again, the idea of information as we have come to know it permeates the quote as the all-dominating, yet completely undefined signifier. We also have the added point about enhanced interrogation techniques, an addition which shows how intimately connected the quantifying axiomatic of the informational paradigm and techno-scientific ideas about torture were in the U.S. torture regime. More specifically, the link between the two is marked by the argument that "Abu Zubaydah required . . . 'enhanced interrogation techniques'," a phrase that almost seems to suggest that he himself is asking to be tortured; again, the need for information and techno-scientific tools with which to procure this information are presented not as a deliberate choice, but as something immanent to the dark side itself.

Not only was the quarantine period needed for SWIGERT and the CIA to figure out how to crank up the torture several notches. The 47 days of isolation were also necessary in order to give time for the White House, and the Office of Legal Counsel to create the legal scaffolding for a torture regime which had already begun its techno-scientific work of axiomatizing the dark side, but which was still perceived too soft to really get the job done. While Zubaydah was held in isolation from June 18, 2002, to August 4, 2002, the FBI left the site and never returned, wanting nothing to do with the torture. With the FBI gone, the CIA and SWIGERT held meetings during which the latter suggested to go a lot farther than they had up until that point:

(~~TS//~~[redacted]~~//NF~~) In early July 2002, CIA officers held several meetings at CIA Headquarters to discuss the possible use of "novel interrogation methods" on Abu Zubaydah.[134] During the course of those meetings SWIGERT proposed using techniques derived from the U.S. military's SERE (Survival, Evasion, Resistance and Escape) school.[135] SWIGERT provided a list of 12 SERE techniques for possible use by the CIA: (1) the attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) waterboard, (10) use of diapers, (11) use of insects, and (12) mock burial.[136] SWIGERT also recommended that the CIA enter into a contract with Hammond DUNBAR, his co-author of the CIA report on potential al-Qa'ida interrogation resistance training, to aid in the CIA interrogation process.[137] Like SWIGERT, DUNBAR had never participated in a real-world interrogation. His interrogation experience was limited to the paper he authored with SWIGERT and his work with U.S. Air Force personnel at the SERE school.[138]

(*Committee Study,* 32)

Here we begin to see the full extent of the system that SWIGERT, and now, on SWIGERT's recommendation, his equally inexperienced partner DUNBAR, a.k.a. Bruce Jessen, were to set up as contractors for the CIA and, to some extent, contractors for and architects behind the whole U.S. torture regime as such. We see that this regime was built around SERE techniques, i.e. the entirely exercise-based role-playing scenarios run by the army to prepare cadets for what they might meet when interrogated by "enemies that refuse to follow the Geneva Conventions and international law," as Senator Carl Levin put it at a December 2008 Senate inquiry into the torture regime.[150] Put simply, SWIGERT and DUNBAR "proposed reverse engineering" (Siems, 44) what had been a training exercise to learn soldiers deal with non-Geneva complying rogue nations, and put the results to the use in the service of the CIA and the Army.

It is important to notice the dates these events took place: Zubaydah was put in isolation on June 18, 2002, and in early July—while he was still isolated—SWIGERT, DUNBAR and the CIA started to set out the techniques to be used in stage two of the interrogation. Yet, they had to await legal-political go-ahead from the White House, and that only came with the August 1, 2002, memo which we analyzed in the previous chapter; Zubaydah's isolation, then, was not contingent on any tactical or interrogational considerations, but only one thing, namely CIA, SWIGERT and DUNBAR's knowledge that the twelve techniques described above were illegal and could cost them not only their job, but also an extended jail sentence if they did not have a get-out-of-jail-free card from the Department of Justice before they began the atrocities.

[150] Carl Levin. "Statement of Senator Carl Levin on Senate Armed Services Committee Reports of its Inquiry into the Treatment of Detainees in U.S. Custody." Available at http://fas.org/irp/news/2008/12/levin121108.html

Bybee, The Ventriloquist

From August 4, 2002 through August 23, 2002, the "CIA subjected Abu Zubaydah to its enhanced interrogation techniques on a near 24-hour-per-day-basis." (40) The date on which Zubaydah's nightmare began, then, is not close to being coincidental: it starts only three days after the memo we analyzed in the previous chapter was sent to the White House from Jay Bybee at the Office of Legal Counsel, destroying any meaningful application of U.S. anti-torture legislation and thereby putting CIA agents and contractors in a situation of complete impunity. Yet, due to the aforementioned "risk averse culture" within the CIA—i.e. the fear that illegal actions taken by the CIA on presidential orders would end up being pinned on CIA alone and the fear of individual agents that they could be prosecuted for partaking in what up until then had been illegal—the generalities of the Bybee memo were clearly not enough for the CIA and their contractors; they wanted a legal rundown of the twelve specific techniques listed above before they began (Forsythe, 56-57).

On August 1, 2002, a different missive therefore also went out from Bybee, this one not to the White House, but directly to John Rizzo at the CIA. The second Bybee memo of the day did not become public until 2009 and to this day it still contains important redactions, but in essence the memo is an answer and a go-ahead to eleven of the above twelve techniques (only mock-burial was denied) requested by SWIGERT – techniques it was now possible to perform with impunity due to the *de facto* destruction of U.S. anti-torture law in the first of the August 1 memos. Apart from the techniques themselves the opening of the memo strikes right at the heart of the paradoxes connected to the use of torture as a techno-scientific tool in the quantifying axiomatic. Bybee starts out by noting that:

> Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. If these facts were to change, this advice would not necessarily apply (Cole, 107).

The almost neurotic repetition of these terms leaves no doubt that Bybee is not only in the process of providing legal cover for CIA agents, but also for himself. But what are the "facts" that this frantic disclaimer refers to? We learn this in the next sentence:

> The interrogation team is certain that he has additional *information* that he refuses to divulge. Specifically, he is withholding *information* regarding terrorist networks in the United States or in Saudi Arabia and *information* regarding plans to conduct attacks within the United States or against our interest overseas . . . Moreover, your intelligence indicates that there is currently a level of 'chatter' equal to that which preceded the September 11 attacks. In light of the *information* you believe Zubaydah has and the high level of threat you believe now exists, you wish to move the interrogations into what you have described as an 'increased pressure phase' (ibid., emphasis added).

The chorus of this enumeration is now quite familiar to us: everything is done in order to procure information, and information is connected to the equally vacuous concept of "chatter," i.e. the amassed and disembodied voices of thousands if not millions of phone calls, text messages, emails, and other online activity. Notice that chatter is measured not by gravity or relevance, but by "level;" it is, as information, a purely quantitative object with no discernible value or meaning apart from that of being comparatively high or low in level. It is, in short, emblematically axiomatic.

The "facts" that make his legal opinion applicable are essentially not facts at all, then, but a set of almost undefinable potentialities and conjectures rippling outwards from the most scary (terrorists networks and attacks in the United States") towards the scary, but not quite as scary ("Saudi Arabia" and "interest overseas".) Binding all these potentialities together is the conjunction "or" which seems to be a variant of the "etc." that Bybee uses in other memos and the "or . . . or . . . or" of Deleuze and Guattari's body without organs. Zubaydah's body has all the characteristics of a resource for the quantifying axiomatic which, again, has no endpoint because its very nature is to propagate endlessly. It does not hold one specific piece of information that needs desperately to be pried out (as was the case in both the KUBARK manual (are you a spy?) and the ticking time bomb-scenario (where is the bomb?)), but is more of a surface, a body without organs, onto which the general, abstract desire of the quantifying axiomatic of information can attach itself and inscribe itself on.

So Bybee's advice hinges on and Bybee himself will only be held accountable if the claim that the level of "chatter" is equal to that preceding the 9/11 attacks is correct and if Zubaydah has information. On the one hand, the CIA is "certain" that Zubaydah himself has more information, and on the other hand, the CIA and SWIGERT have information of their own about a certain level of chatter, information which, again, is nothing but a number –a "high level" of chatter. What SWIGERT and DUNBAR's techno-scientific torture is needed for is to triage these two sets of information in order to

create even more information through what Edward Snowden called “linkability;” torture is a technique that binds various bits of information together into ever growing strings of information, somewhat equal to how nucleobases are bound together to form chains of DNA. Yet the thing is, as we have seen, that there is no end in sight for this specific string of DNA which means that the beast for which it remains the blueprint just keeps on growing. Torture does not beget an end to torture, but a spread of torture. According to the CIA, for instance, the torture of Zubaydah in turn led to the arrest of José Padilla—the guy with the outrageous uranium-in-a-bucket-plan—and Padilla would of course eventually also be tortured, leading forensic psychiatrist Dr. Angela Hegarty to say that his specific case essentially represented the “destruction of a human being's mind.”[151] The quantifying axiomatics categorically spreads like a desert, dragging still more people into its machinations.

The “increased pressure phase” that Bybee refers to in the end of the above quote—the phrase is in quotation marks in the original, meaning that this was probably the term used by SWIGERT himself when requesting permission to proceed to stage two of the torture—refers to the above mentioned 19 day period where Abu Zubaydah was tortured around the clock. The comparative adjective “increased” also implicitly refers to the preceding period of torture which we therefore are led to assume was more breezy for Abu Zubaydah. As if the implication of the adjective's comparative form was not enough, ingrained in the list of “facts” that make Bybee's advice viable is also a sentence saying that “Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information” (106).

Again, it is not clear what “certain level of treatment” Bybee refers to, but it can either be the normal, non-coercive interrogation performed by Soufan (which had ended a while ago and had, in fact, been highly successful); it can refer to the first techniques of self-inflicted pain and sensory deprivation initiated by SWIGERT; or it can refer to the fact that neither the CIA nor SWIGERT found the time to interrogate Abu Zubaydah in the 47 days leading up to the date of the present memo, seeing as they were spending most of their days planning and getting White House and Office of Legal Counsel approval for an even more enhanced torture program.

Building on the information he received from SWIGERT, Bybee notes that the increased pressure phase “will likely last no more than several days but could last up to thirty days” (107). Again, Bybee's wording is horribly inaccurate seeing as “several days” could just as well denote thirty days as a few days; and true to form, the “increased pressure phase” that would shock Zubaydah out of the

[151] www.democracynow.org. ”An Inside Look at How U.S. Interrogators Destroyed the Mind of Jose Padilla.” August 16, 2007. http://www.democracynow.org/2007/8/16/exclusive_an_inside_look_at_how

luxury of his assumed "level of treatment" ended up being an around the clock operation that lasted for nineteen days.

In Bybee's missive to John Rizzo at the CIA, we once again meet SWIGERT in person, so to speak. SWIGERT, even though he is merely a contractor, seems to have all but taken over the proceedings both in reality and in the discourse of the memo:

> As part of this increased pressure phase, Zubaydah will have contact only with a new interrogation specialist, whom he has not met previously, and the Survival, Evasion, Resistance, Escape ("SERE") training psychologist, who has been involved with the interrogation since they [sic] began . . . You have also informed us that Zubaydah sustained a wound during his capture, which is being treated (Cohle, 107).

This quote clearly stretches the truth to its breaking point or even beyond; the "SERE" training psychologist—SWIGERT, a.k.a. James Mitchell—had in no way been involved with the interrogation since it began, but had only come in long after Soufan had begun his successful interrogation of Zubaydah.

Further, claiming that a person with potentially lethal gunshot wounds in his thigh, groin, and stomach has merely "sustained a wound" seems to be somewhat of a moderation of the truth. However, these fallacies are not only matters of inaccuracy nor even of willful distortion; they are the most salient symptoms of how the enumeration of conditions ("facts" as they are called in the memo) under which Bybee claims his advice applies quickly come to blur with his legal analysis, having the effect of making it impossible to separate facts on the ground from legal opinion or analysis. Compared to the other August 1, 2002 memo in which Bybee's highly idiosyncratic voice fills the entire memo to such an extent that the actual tortured bodies disappear, in the first part of this second memo Bybee's does not seem to be there at all.

Instead of speaking through Bybee, everything appears to speak through the voice of a nameless "you" who provides all the information based on which the actual torture is going to be performed. Expressions like "You have also orally informed us," "You have indicated that," "You have learned," and "You would like to" are followed by descriptions of the techniques this "you" wants permission to perform, ranging from the self-inflicted pain of stress positions over placing Abu Zubaydah in a small box with an insect to waterboarding him. Not only does the nameless "you," who has all these desires and all these techniques in mind, ask Bybee to green light them; the nameless "you" also describes their

effects in terms that, like pieces of a jigsaw puzzle, fit perfectly into Bybee's other memo of the day, the one for President Bush's council at the White House. The "you" thus concludes at several occasions by telling that the pain felt from many of these techniques in no way constitutes "severe pain" and that the psychological effects of the techniques will not be "prolonged."

As the case was for Bybee in the other memo, the hardest obstacle to surmount for the "you" is how to escape the instinctive notion that waterboarding Zubaydah or placing him in a box with an insect would indeed produce "prolonged mental harm." While in the other memo Bybee has to turn to a strange assemblage of superficial dictionary entries and highly idiosyncratic understandings of what "prolonged mental harm" in fact means, in the present case he can let the other voice, the voice of the expert or the scientist, speak the voice of an absolution he has essentially constructed himself:

> You have informed us that you have consulted with [redacted, but in all likelihood a reference to SWIGERT] who has ten years of experience with SERE training . . . He stated that, during those ten years, insofar as he is aware, none of the individuals who completed the program suffered any adverse mental health effects. He informed you that there was one person who did not complete the training. That person experienced an adverse mental health reaction that lasted only two hours. After those two hours, the individual's symptoms spontaneously dissipated without requiring treatment or counseling and no other symptoms were ever reported by this individual . . . not resulted in any instances of prolonged mental harm (Cohle, 111).

Not only has only one person ever encountered problems in connection with SERE training; this one person who did have an "adverse mental health reaction" suffered from this for "only two hours" after which it "spontaneously dissipated." The concept of spontaneous dissipation is as alluring as it is dangerous; how can a program designed to simulate as realistically as possible the actual conditions of torture for days on end only create a two hour long adverse mental health reaction? Is not the point of such a program exactly "adverse" mental reactions? Do traumas connected with torture really act like gasses that leak out almost instantaneously as soon as the nozzle of the water bottle is removed from the cloth covering the waterboarded person's face? Of course not; and as many testimonies will show, SERE training was in no way as benign and non-intrusive as the nameless "you" wants us to believe.[152]

Yet, the wording of the quote is only strange outside the quantifying axiomatic of the informational paradigm proper to the dark side. If read within the analytic framework of this

[152] Slate. "Cancel Water-Boarding 101." January 29, 2009. http://www.slate.com/articles/news_and_politics/jurisprudence/2009/01/cancel_waterboarding_101.html

dissertation, everything makes perfect, albeit perverted sense: first, the quote refers to the statements of a person who knows more about torture and the SERE techniques than anyone else. This person is undoubtedly SWIGERT (aka "Boris," aka James Mitchell,) and he is an expert in the techno-scientific art of torture. Second, the quote plays into the idea of a "reasonable person," the idea of an *average* participant in SERE, which we have already seen used to deny the detrimental mental effects of torture in the previous chapter. And again, the quote does not negotiate the fact that SERE is an exercise scenario, a role-play, and that those who participated in it knew this from beginning to end (and that many, even with this knowledge, suffered more than negligible negative reactions to their ordeals.) Lastly, the "dissipation" of the "adverse mental health reaction" matches perfectly Bybee's conclusions in the previous memo, namely that torture whose adverse mental health effects are only passing is not torture. We see then that everything in Bybee's text is made to match with his other text; he is essentially having a dialogue with himself.

We can therefore only understand the bizarre rhetorical situation of the memo if we view it as a sort of ventriloquist's act where Bybee shifts between various more or less fictional subject positions in order to make things seem alright and subject to rigorous legal scrutiny. As with a proper ventriloquist's act, the artist not only has to shift between various voices, but also between attitudes, tones, and limits to his or her knowledge in order to make the act believable; he has to pretend that his alter ego knows things he does not know himself, pretend to be surprised, to be cautious, to be hesitant etc. Through such role playing, a true dialogue can grow out of what essentially is an entirely fictional situation set up by Bybee himself, making it so that such blatant absurdities as "You describe that in an initial confrontational incident, Zubaydah showed signs of sympathetic nervous system arousal, which you think was possibly fear" (Cohle, 115) suddenly seem normal.

The position that this role-playing game enables Bybee—and, by proxy, his White House and Office of Legal Counsel boss—to inhabit is that of the blissfully ignorant individual back in Washington who, faced with the chaos of the dark side, has to give permission to put on the thumb screws to those who face the very real day-to-day challenge of organizing the dark side through techno-scientific means. The role-play is about what is needed by those who know about "scientific" torture and the need for information, and it is almost as if this knowledge, again, comes from the nature of things themselves, as if the dark side gives an imperative to SWIGERT and DUNBAR, and thus to Bybee, to torture. Yet, the reality was that the experts were nothing but SERE role-players whose "expertise" was used in yet another role-play, a juristic role-play, between Bybee and a cabinet of other voices his rather clumsy discourse only barely manages to feign in any believable way. And as for Abu

Zubaydah? He was to be kept "incommunicado" for the remainder of his life, alive, but not alive to tell his tale.[153]

Breaking the Dam

The *Committee Study* tells the story of a fantasy: a fantasy that one day the quantifying axiomatic will have mapped all of the dark side, and that this full mapping will come to pass through the techno-scientific exploitation of hundreds or thousands of individuals. As all other fantasies, this particular fantasy haunted the U.S. torture regime as the imaginary, yet impossible-to-reach end-point, marred by a particularly cruel version of what literary scholar Lauren Berlant has called *cruel optimism*. We know very well that an end to axiomatization is categorically impossible; there can be no end to a purely quantitative regime, numbers can extend endlessly, and you can always have more than less, and you always *want* more than less. But in spite of this—or because of this—this fantasy fueled the whole operation. It was the ghost in the U.S. torture machine, a ghost which haunted it with an impossibility as much as it blessed it with a promise: one day, complete transparency could be reached if only a Faustian deal to engage with quantifying axiomatization through techno-scientific torture could be agreed upon.

President Bush claimed in an earlier quote that the interrogation of Abu Zubaydah had yielded information which Zubaydah had thought to be "nominal," but which was in fact, or so claimed Bush, vital: the identification of one of the 9/11 masterminds, Khalid Sheikh Mohammed (KSM), and his alias "Mukhtar." We have also seen that Bush's statement was so imprecise as to border on a lie, and, as it turns out, Bush's statement not only bordered on a lie but was a lie through and through: the authorities knew about KSM already *before* 9/11, that his alias was "Mukhtar," and that he was deeply involved in terror planning (Mayer, 176), and many voices in the intelligence and national security had, as we know, in fact tried to get Bush and Cheney to do something about Al Qaeda. In early 2003, roughly six months after the torture of Abu Zubaydah began its second, much harsher stage KSM was eventually caught in Pakistan – not because of anything Zubaydah had said while being tortured, but due to a $25 million reward to a Pakistani informant (Mayer, 270).

153. "There is a fairly unanimous sentiment within HQS that [Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be relased. While it is difficult to discuss specifics at this point, all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life. This may preclude [Abu Zubaydah] from being turned over to another country, but a final decision regarding his future incarceration condition has yet to be made" (*Committee Study*, 35).

KSM was thought by the CIA to be an even bigger fish than Zubaydah, and in this specific case the CIA were right: KSM was a close confidant of Osama bin Laden and had both had a hand in terror attacks up through the nineties and the 9/11 attacks. If Abu Zubaydah had held the promise of first class "exploitation" for information, KSM was in an even bigger league, and the CIA language describing his treatment seems to almost be that of a person who has found a pot of gold which he only has pry open in order to reach its enchanting contents.

This juxtaposition of a hard, almost unbreakable shell with endless amounts of valuable contents—which is a strong metaphor for the overall dream of the U.S. torture regime to one day reach the final, all-axiomatizing *jackpot*—was explicitly expressed by the CIA, when in one of their assessments from early April of 2003 the subject line read "Khalid Shaykh Muhammad's Threat Reporting – Precious Truths, Surrounded by a Bodyguard of Lies" (*Committee Study*, 82). The fantasy, then, took the shape of penetrating this "bodyguard of lies," in order to let the information flow freely and endlessly. Generally, the CIA accounts—often wildly exaggerating the success of the enhanced interrogation techniques—turn precisely to the language of flows and streams to describe their operations. This, in turn, relates back to Deleuze and Guattari's body without organs along which the free flowing desires can run freely; the bodies of the detainees were literally fantasized to be sites from which one, through techno-scientific means, could force open a flood of information which would axiomatize the dark side, but which would also, one day, bring an end to this axiomatization when the endless flooding of these bodies had flooded the whole dark side. "Breaking" a detainee, then, was like breaking a dam whereby one released an immense potential energy of held back streams and turned them into axiomatics. As General Michael Mukasey wrote as late as 2011 in *The Wall Street Journal*:

> Consider how the intelligence that led to bin Laden came to hand. It began with a disclosure from Khalid Sheikh Mohammed (KSM), who broke like a dam under the pressure of harsh interrogation techniques that included waterboarding. He loosed a torrent of information—including eventually the nickname of a trusted courier of bin Laden.[154]

This whole paragraph brims with references to water and to flows, expressing the fantasy of a final ejaculation of information. Not coincidentally, the references are not only to the flows of information that would come *after* torture, but also to the torture itself: what is needed to break the dam and make

[154] The Wall Street Journal. "The Waterboarding Trail to bin Laden." May 6, 2011. http://www.wsj.com/articles/SB10001424052748703859304576305023876506348

the torrents flow is the "pressure" of harsh interrogation techniques, including "waterboarding." Water and flows on both sides, so to speak; techno-scientific torture is about applying one set of flows to a body without organs in order to make even more flows of information run freely from this body. All qualitative differences are liquefied, even those between torturer and victim, between metaphors for means and metaphors for ends. Everything is caught up in the same logic on the dark side where flows are engineered, but where flows also act as engineers themselves and form still greater amounts of victims, technicians, production sites, techniques, memos, all to create still greater heaps of information.

Breaking the Person

Abu Zubaydah did eventually break, but no true flows of information ran from his body as torrents from an endlessly rich dam. Instead, Zubaydah, who had already sustained life-threatening injuries during his arrest, became physically and mentally ill, spending all of his time "masturbating like a monkey in the zoo" (Mayer, 175). The masturbation became so frequent that his guards intervened in order for him not to hurt himself, and at one point, Zubadayda also became scared himself "because there was blood in his ejaculate. He saved it for the doctors in a tissue, to show them in the morning. The doctor said not to worry" An anonymous CIA officer explained this habit of Zubaydah laconically: "I guess he was bored, and mad" (ibid.).

Much later, in 2009, Joseph Margulies—whom we have already met as a lawyer for other Guantanamo detainees, and meet again here as counsel for Zubaydah—described his condition the following way:

> Partly as a result of injuries he suffered while he was fighting the communists in Afghanistan, partly as a result of how those injuries were exacerbated by the CIA and partly as a result of his extended isolation, Abu Zubaydah's mental grasp is slipping away. Today, he suffers blinding headaches and has permanent brain damage. He has an excruciating sensitivity to sounds, hearing what others do not. The slightest noise drives him nearly insane. In the last two years alone, he has experienced about 200 seizures. But physical pain is a passing thing. The enduring

> torment is the taunting reminder that darkness encroaches. Already, he cannot picture his mother's face or recall his father's name. Gradually, his past, like his future, eludes him.[155]

Deleuze and Guattari's idea that "technical production" finds new ways to "appropriate the memory . . . of man" here finds its most tragic embodiment: after having been subjected to the U.S. torture regime, Abu Zubaydah's memories of his mother's face and his father's name are slipping away from him, as if the exploitation had not only mined his memory, but literally mined it *out.* Zubaydah now sits in Guantanamo, kept there as a burned out fuel rod from a nuclear plant, and as with used nuclear rods nobody quite knows what to do with him after the techno-scientific exploitation is over. Of course, and in order to still meet the utilitarian arguments for the torture regime on its own conditions, we must ask one last question: Did the CIA get the information they wanted? Was it worth it?

> An al-Qaeda associate captured by the CIA and subjected to harsh interrogation techniques said his jailers later told him they had mistakenly thought he was the No. 3 man in the organization's hierarchy and a partner of Osama bin Laden, according to newly released excerpts from a 2007 hearing. 'They told me, "Sorry, we discover that you are not Number 3, not a partner, not even a fighter"' said Abu Zubaida,[156] speaking in broken English, according to the new transcript of a Combatant Status Review Tribunal held at the U.S. military prison in Guantanamo Bay, Cuba. President George W. Bush described Abu Zubaida in 2002 as 'al-Qadea's chief of operations.' Intelligence, military and law enforcement sources told the Washington Post this year that officials later concluded he was a Pakistan-based 'fixer' for radical Islamist ideologues, but not a formal member of al-Qaeda, much less one of its leaders.[157]

As it turns out, then, Abu Zubaydah was not the person they thought he was. But by the time they found out it was too late – at least for Zubaydah, whose mind now literally fades away at Guantanamo, as if he were himself aware that he is no longer of any value to the U.S. torture regime, that his days as an important resource to be worked through the techno-scientific torture are over. Yet, even if the fact

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155. LA Times. "Abu Zubaydah's Suffering." April 30, 2009. http://articles.latimes.com/2009/apr/30/opinion/oe-margulies30

156 The "Abu Zubaida" mentioned in this article is the same Abu Zubaydah we have followed through this chapter; the difference in spelling is due to variations on how to transcribe the Arabic name into Latin letters.

157 The Washington Post. "CIA Says It Misjudged Role of High-Value Detainee Abu-Zubaida, Transcript shows." June 16, 2009. www.washingtonpost.com/wp-dyn/content/article/2009/06/15/AR2009061503045.html?hpid=moreheadlines

that Zubaydah would end up not having anything close to the "intelligence value" ascribed to him by the CIA makes his situation so much more tragic it would be faulty to equate this with the failure of the techno-scientific paradigm. As "patient zero" in the system Zubaydah's assumed status as high-value detainee gave ample opportunity to try the techniques that would later be applied to other detainees, and if "breaking" the detainee were the mission this first test-run was surely successful.

More importantly, when mapping the "uncharted territory" of the dark side through the quantifying axiomatic of information there can be no absolute failures, just as there can be no absolute victories. There can be only relative setbacks or relative successes, relative to how much information the authorities were able to subtract from the detainee. Even when this number was close to zero no one seemed to perceive it as a failure, and within the strict terms of the techno-scientific paradigm of torture it *was* not a failure – it was just yet another square of "uncharted territory" that now had been mapped. If this square turned out to be inconsequential it did not matter, the same way that a scientific experiment which does not yield the results one expected is not a failure either, but a contribution to the overall mapping of the world.

Lastly, and as we shall see in the next chapter, a detainee's intelligence value or status on the "dark side" was not really the issue in the U.S. torture regime; reality itself became warped by the informational paradigm, twisting space and time in exceedingly strange ways as the program developed and spread from country to country and from prison to prison.

CHAPTER EIGHT:

THE END OF THE RIVER: REMEMBERING KURTZ

> The coils of a serpent are even more complex than the burrows of a molehill.
>
> Gilles Deleuze

In this chapter, a ghost passes us on its way to the future. It is the ghost of a specific way of viewing the world and we meet it just as it has taken over yet another set of machines, namely those of national security. The ghost represents a complex operation: first, split the world into two incommensurable sides, one light, one dark; then, feel the full brunt of paranoia which comes from this operation; then, convert the chaotic and dark side of the world into a productive body, into an axiomatizing machine; work this body through a type of torture that comes to look a lot more like techno-scientific exploitation of a resource than the physical or mental abuse of a human being; and finally, and as we will see in this chapter, let yourself be enthralled and consumed by this "perverted, bewitched world," view it as a "quasi cause" for everything that happens, let your own operations be mere reactions to a world which essentially asks for it.

A Haunted House

We employ the metaphor of a "ghost" only reluctantly since it has been used (and perhaps overused) by writers ever since Marx and Engells started their famous manifesto with it. Yet, when it comes to Abu Ghraib prison—the British built facility roughly twenty miles from Baghdad which was first used by Saddam Hussein and then, in a display of almost unbelievable inappropriateness, by the U.S. forces after the invasion—the idea of ghosts do not just apply metaphorically, but quite literally. Sam

Provance, one of the soldiers who blew the whistle on the Abu Ghraib abuses, describes the place as follows:

> There were brains splattered across the wall. The wall was red – a really old, dark, dried-blood red. There were pieces of matter in it . . . I was like, 'Oh my God, where am I?'
> . . .
> 'The place was just haunted,' he recalls. 'There was noise coming from places where there weren't supposed to be people. You'd be like, "Was that real? Was that a ghost?"' (McKelvey, 9)

Provance's account adds something to the abuses at Abu Ghraib that is not immediately visible in the pictures, namely a general mood of complete surrealism, of a place so saturated with brutality that it must have been painful even for the guards who served there. The prison appears as a brick-and-blood embodiment of madness and human monsters, whether they be monsters in the service of Saddam or Bush, and when Specialist Charles Graner—the putative "leader" of the Abu Ghraib abuses—said before his court-martial in 2005 that "Today you're going to find out what kind of a monster I am" (McKelvey, XIII) it therefore seemed more than appropriate. Moreover, the prison is situated only an hour's drive from the ruins of what thousands of years ago was the ancient city of Babylon, the topological villain of the Revelation, and Provance's account of the prison after the fall of Baghdad thus eerily echoes the biblical account of the fall of Babylon at the end of days, where also ghosts will roam freely: "Babylon the great is fallen, is fallen, and is become the habitation of devils, and the hold of every foul spirit, and a cage of every unclean and hateful bird" (Revelation, 18:2).

The soldiers serving at Abu Ghraib prison cannot have been unaffected by the surreal, apocalyptic haunting of tortures past, and maybe partly as a reaction to this they would stock up on "Robitussin," a cough medicine which, when mixed with tablets of Vivarin, would give a "cheap high—like LSD"(McKelvey, 21). They called this "Robotripping," and we can try to imagine how "Robotripping" must have been in that prison: acid-like hallucinations in a haunted desert prison with blood and brain splatters on the wall and the sounds of ghosts filling the halls.

Other first-hand accounts also turn to a religiously inflected language of rapture when trying to describe the experience of serving in the War On Terror; U.S. Army interrogator Chris Mackey describes how "The Kandahar airport terminal had a Planet of the Apes look about it. The blown-up snack bar, the burned-out luggage reclaim area, the ticket counters – it was all post-apocalyptic" (Mackey, 63). As almost always is the case with first-hand descriptions of the war on terror, Mackey

not only turns to religion, but also to popular culture to find a language with which to describe what he sees. Mackey's sentiments are echoed by Provance who tells us that "Abu Ghraib was *Apocalypse Now* meets *The Shining* . . . a surrealist combat zone with the horror and haunting of *The Shining*" (27). Both in Iraq and in Afghanistan, then, we have apocalypse on one hand, surrealism on the other.

It is as if Mackey and Provance describe both something that has already happened, and something that is about to happen, or even something they see happen in front of their very eyes. Yet, most salient in their accounts is the shared sensation of having traveled to a completely different world, a world which appears to obey a completely different set of rules, and a world which can only be properly described by turning to the language of fiction, even if the threats lurking in this world and the tasks the soldiers were sent there to perform were very real. It is as if Iraq and Afghanistan were experienced as something both real and unreal at the same time, as if the dark side into which the two soldiers have been plunged teeters between illusion and reality, and as if these two poles are not working against each other but actually serve to reinforce each other. Mackey and Provance's common experiences are only the more extreme versions of a phenomenon that permeates all testimonies from the War On Terror, from the rungs of the White House all the way to the detainees themselves. It seems all but impossible for anyone who, for good or for bad, were part of the events to relate what they saw and felt without doing so by turning to fiction, even if the thing, situation, or person described is viscerally real.

Such questions of blurred lines between illusion and reality may seem academic or even sort of "post-modern," but for Guantanamo guard Sean Baker they would take on visceral and tragic importance. On 24 January, 2003, Baker raised his hand to Second-Lieutenant Shaw Locke's demand for a volunteer. As it turned out, Locke wanted to train his "ERF team" – one of the rapid response teams, that is, which enters a cell to assume control over a detainee who does not comply with the orders given by his guards. For this training situation to be realistic, Locke needed someone who could play the recalcitrant detainee, and unbeknownst to him, this was what Sean Baker signed up for when he volunteered.

Baker, knowing that the ERF teams did not play around, made Locke promise to tell the team that the person in the cell would be a mere actor. Contrary to his promise, however, Locke did not tell the armed and armored men that they were about to crack down on one of their own:

> As he was instructed, Baker refused the ERF team's orders and hid under the bunk. They entered the cell, they beat him, choked him and slammed his head against the floor . . . The

> beating continued, particularly by the soldier on his back, a man called Scott Sinclair. "That individual slammed my head against the floor and continued to choke me," he said. "Somehow I got enough air, I muttered out, "I'm a US soldier, I'm a US soldier"
>
> . . .
>
> Baker started having seizures that morning . . . Baker suffered brain damage. A military medical board determined that he suffered from mood and seizure disorders caused by a traumatic brain injury he sustained while "playing [the] role of detainee who [was] non-cooperative and was being extracted from detention (sic] cell in Guantánamo Bay, Cuba" (Smith, 225).

Let us not forget that this was a unique situation only because the victim was the wrong person; as Joseph Hickman describes it, ERF teams routinely entered cells to perform take-downs of detainees, and there is no reason to assume that the treatment which Baker wrongly received was not the treatment that real detainees received regularly and intentionally. How can we uphold the line between fantasy and reality in such a situation? How can Sean Baker, the victim, or Scott Sinclar, the violator?

Prisoner #63

The dark, chaotic world described by Mackey and Provance is the world which growing amounts of information was supposed to have organized and made transparent by axiomatizing it, yet everywhere in the War On Terror the blurring of illusion and reality seemed to persist. As the testimonies of Mackey and Provance tell us, this blurring was not a mere *gestalt* created to confuse or scare the detainees, but a basic feeling which took hold also of those who worked for the allied forces.

In a July 14, 2004 letter from Deputy Assistant of the FBI's Counterterroism Division T.J. Harrington to Major General Donald J. Ryder entitled "Re. Suspected Mistreatment of Detainees," Harrington follows up on a previous discussion on detainee treatment by relating three instances of "highly aggressive interrogation techniques being used against detainees at Guantanamo." The third instance is described by Harrington the following way:

b6 -4
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3 In September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate detainee [redacted] and, in November 2002, FBI agents observed Detainee [redacted] after he had been subjected to intense isolation for over three months. During that time period, [redacted] was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end). It is unknown to the FBI whether such extended isolation was approved by appropriate DoD authorities.

The detainee hiding behind the redactions is prisoner 63 at Guantanamo – Mohammed al-Qahtani, also known as the "20th hijacker" for his alleged plans to partake in the terror attacks of 9/11 (his plans came to nothing when he could not obtain a visa to enter the country). Al-Qahtani's state of mind—described as "extreme psychological trauma"--was only one of many such reactions to the treatment the detainees were subjected to, but even then, most of the guards who had a day-to-day interaction with the prisoners did not partake in the torture and thus could not know exactly why the reactions were so violent. We, however, know what they were subjected to and therefore have no problems imagining that the "extreme psychological trauma" was the direct consequence of torture.

However, Joseph Hickman in his *Murder at Camp Delta* (2015) may give another answer as to why Al-Qahtani was suffering from "extreme psychological trauma." After returning from his stint in Guantanamo as a deeply disillusioned soldier—having witnessed first-hand the atrocities committed by the U.S. Army and suspecting that even more sinister things than those he had witnessed were taking place—Hickman started going through various reports from the NCIS. Here, he noticed that a prisoner—Ali Abdullah Ahmed—had been given a "750-milligram dose of the antimalarial medication mefloquine, followed by another 500 milligrams twelve hours later" (Hickman, 198). This struck him as strange for several reasons; first, Cuba has no colony of the mosquitoes that carry malaria, meaning that shots against the disease are superfluous; secondly, the military did not use mefloquine anymore since it sometimes produced "anxiety, hallucinations, depression, insomnia, and suicidal thoughts;" and, third, the dose prescribed was several times higher than that given to soldiers when mefloquine was actually still in use.

The conclusion Hickman draws—the only reasonable conclusion to draw, as it were—is that under the guise of medical prudence and of caring for the health of the detainees, the U.S. military and its doctors deliberately overdosed an outdated and superfluous malaria medicine in order to induce psychosis and hallucinations in the detainees. As Hickman notes about the medical system at Guantanamo in general, "[l]ike the mefloquine given detainees, some of this medical attention may have been a twisted form of punishment or even torture" (ibid., 230). The important thing to notice here

is, again, that Hickman's experiences at Guantanamo was of an insane dark side, of psychotic inmates and endless chaos, and that he only afterwards, as one guard among hundreds or perhaps even thousands of guards that have served at Guantanamo, started looking into the reasons for why things were as they were and discovered that they were thoroughly orchestrated. Willards voice-over in *Apocalypse Now* which notes that "It smelled like slow death in there, malaria, nightmares. This was the end of the river alright" suddenly seems eerily appropriate.

Hickman eventually teamed up with Professor Mark Denbaux at Seton Hall University who, along with a team of students and researchers, worked on exposing the atrocities of the War On Terror. Here he learned something new, and perhaps even more shocking; the three detainees who committed suicide in 2006, those detainees whose suicide we have heard Admiral Harris slander as instances of "asymmetrical warfare," had in fact not committed suicide at all; they had been killed during CIA torture, and their presumed suicides were staged in order to literally let their torturers get away with murder (for, as we remember, torture was illegal in Bybee's memo if one were so bad at it that the victim died.)

From Hickman's book and our general knowledge about the case we can therefore reconstruct the following series of events which, quite frankly, is almost too outlandish to believe: the CIA tortured three people to death; they then returned them to their cells where they left them in order to make their deaths look like suicides; the U.S. military then refused to acknowledge that even these suicides *which had been faked by the military itself* were acts of despair, but, instead, reinjected the fact of the "suicides" into the logic of the quantifying axiomatic as an argument for the fact that the dark side still existed and that torture still had to be done.

What we see, then, is that an endless spiral of unrealities seems to have wrapped itself around the War On Terror as a sort of snake or double helix, making it impossible to separate facts from lies, lies from inaccuracies, inaccuracies from fantasies, and fantasies from drug-induced hallucination. Nothing speaks greater to this fact than the three suicides which were acts of asymmetrical warfare which were acts of murder. At the same time in Guantanamo, different soldiers must have walked around with different versions of what had happened, agreeing wholeheartedly with Admiral Harris that the suicides were an act of asymmetrical warfare, or agreeing perhaps on principle but also feeling uncomfortable with the designation, or not agreeing at all but viewing them as proper suicides, or maybe knowing that they were not suicides at all, but murders that had only been made to *look* like suicide.

In June 2005, Time magazine leaked an interrogation log of the aforementioned al-Qahtani covering a period from late November 2002 to January 2003.[158] The log describes a month-long, meticulous, almost mechanical attempt to break down a person who, judging from the observations made by Harrington's agents, was already utterly destroyed (perhaps a mefloquine-induced psychosis had contributed to this.) The language of the interrogation log is sloppy, but its content testifies to an extreme attention to the smallest things; each day is described in painstaking detail, broken down into as small increments as ten minutes. A typical day in the life of al-Qahtani was as follows:

1115: Detainee offered water – refused. Corpsman changed ankle bandages to prevent chafing. Interrogator began by reminding the detainee about the lessons in respect and how the detainee had disrespected the interrogators. Told detainee that a dog is held in higher esteem because dogs know right from wrong and know to protect innocent people from bad people. Began teaching the detainee lessons such as stay, come, and bark to elevate his social status up to that of a dog. Detainee became very agitated.

1230: Detainee taken to bathroom and walked 30 minutes.

1300: Detainee offered food and water – refused. Dog tricks continued and detainee stated he should be treated like a man. Detainee was told he would have to learn who to defend and who to attack. Interrogator showed photos of 9-11 victims and told detainee he should bark happy for these people. Interrogator also showed photos of Al Qaida terrorists and told detainee he should growl at these people A towel was placed on the detainee's head like a burka with his face exposed and the interrogator proceeded to give the detainee dance lessons. The detainee became agitated and tried to kick an MP. No retaliation was used for the kick and the dance lesson continued.

1400: Detainee taken to bathroom and exercised 30 minutes in booth. Detainee was asked about his trip to Orlando, who trained him, and who sent him several times but refused to answer.

1510: Detainee offered water – refused. The interrogator then began reducing stress by engaging detainee in conversation. Detainee was asked what he could do to

[158] The full interrogation log is available at http://content.time.com/time/2006/log/log.pdf

return to the good graces of the interrogator. Detainee apologized and interrogator told him it had to be a specific apology. Detainee apologized for lying when he was told not to.

1600: Detainee taken to bathroom. Corpsman checked vitals – O.K. Conversation continued about topics such as music, dancing, history of the Koran, history of the Bible, and Arabian history. Detainee was ignorant of historical events outside of the geographic region of the Arabian Peninsula. Detainee gave names of Islamic scholars that said music was forbidden and the interrogator agreed to review their claims. Interrogator asked detainee about his travel to Europe. Detainee initially did not want to talk about the trip. Interrogator asked if it was because it was Al Qaida related. Detainee responded that it was not Al Qaida related. Detainee said that his only time in Europe was in the airport in London during his trip to Orlando.

1700: Detainee taken to bathroom.

1715: Detainee allowed to take a nap for one hour.

1830: Detainee was awaken from his nap. His vital signs were checked by the medical representative. His blood pressure (100/58) and pulse rate (62) were normal.

The rest of the text includes descriptions of forced enemas, repeated sexual humiliations by female interrogators (with special attention to the relation between sexual abuse and Islam,) dozing with water and subsequent confinement in a freezing cold cell, subjection to white noise and loud music, prolonged tight restraining resulting in painful wounds, and constant, round-the-clock interrogation for months on end (it even also contains moments of involuntary and tragicomic humor, as when Qahtani—after having been tortured for the better part of a year—is asked by his interrogator "why Muslims would consider the U.S. oppressive?")

For all the important sections of the interrogation log and for all its blatant and spectacular abuse, this specific fragment seems to me to be the most important of them all. Chris Mackey said that the "Kandahar airport terminal had a Planet of the Apes look about it," Revelation said that Babylon after its fall had become the "cage of every unclean and hateful bird," and we have seen Zubaydah's pathological masturbation compared to that of "a monkey in the zoo." For Mackey and Provance it really was the end of the river where animals started talking as they do in *Planet of the Apes,* where animals talked and everything was as in a Stephen King horror tale, and it appears that all of this came

from the things themselves, as if the dark side was not something Cheney had invented but only described as a person describing a foreign land.

Yet, in al-Qahtani's interrogation log, we can easily also identify the reverse movement, namely the making-into-animals of the detainees. Al-Qahtani's interrogation was not the odd one out, but immensely typical for how interrogators were expected to view their interogatees: “Look, the first thing you have to do is treat these prisoners like dogs . . . If they ever get the idea that they're anything more than dogs, you've lost control of your interrogation,” General Miller told Janis Karpinski when he visited Abu Ghraib prison immediately before the abuses began (Karpinski, 197-98), and James Mitchell, aka SWIGERT, had as his biggest source of inspiration experiments made with dogs by the famous psychologist Martin Seligman in the sixties (Mayer, 163).

And not only were the detainees treated like dogs, they were also intimated by and bitten by dogs, and deliberately so (Danner, 43). If we consider these different versions and uses of dogs—some discursive, some metaphorical, some literal—as benchmarks for the greater U.S. torture regime we see that the line between that which was real and that which was constructed blurred to the point where the distinction could in fact not be upheld anymore; do you treat them like dogs because they *are* dogs, do you make them into dogs in order to treat them like dogs, or do you exploit the understandable fear of dogs in actual human beings?

Another interesting example of this phenomenon is Chris Mackey's description of how, during his time as interrogator in Afghanistan, he and his colleagues developed a system of “rumor creation,” injecting false rumors into the prisoner population in order to make people talk. This strategy reached hitherto unknown levels of perfection when Mackey fabricated a fake newspaper article with “several icons and menus off the *Los Angeles Times* Web side” pasted on it (Mackey, 318) and gave it to a prisoner. Mackey had deliberately written the article in a “tone” that was “leftish” so as to make it more credible, an extra spin on the strategy of which he seems particularly proud. The fictional article recounted how three al-Qaeda operatives had been executed for their involvement with the 9/11-attacks while also going into the protests against the executions (the latter presumably being part of the “leftish tone” assume:)

> And therein lies the problem, says Richard Durham, president of the American Civil Liberties union. 'What happened at the federal prison at Leavenworth yesterday was a travesty of U.S. justice about which every American should be ashamed.' Mr. Durham is quick to point out that the military tribunal, convened on April 30, could never possibly have heard enough evidence to

support the execution of the Saudi, Egyptian, and Qatari nationals. 'It is a case of a kangaroo court in the extreme, and actually hurts our hope of catching more of those responsible for the atrocities of last fall' (ibid., 319).

According to Mackey, the fake fact of the executions worked magic on the prisoner he tried to break. What Mackey does not seem to realize is that writing such an article is a magic trick that works both ways; all the while the prisoner believes in and is scared by the "truth" of the article, Mackey knows he has fabricated it and therefore believes it to be pure fantasy. Yet as accounts by Joseph Margulies and Clive Stafford Smith have shown the courts that were eventually set up *were* kangaroo courts, and as Joseph Hickman has demonstrated, at least three detainees *were* murdered by the authorities at a U.S. run prison.

A Bodyguard Of Lies

The strange, yet all-permeating mix of reality and illusion not only happened to or was noticed by ordinary soldiers as they served in dangerous and surreal places far from home. One of the topics most expanded upon in the *Committee Study* is that of how the CIA misrepresented or even plainly lied in its reports on the efficacy of the torture regime:

> behind the officers who make them." The notification also stated that "with regard to counterterrorism operations in general and the al-Masri matter in particular, the Director believes the scale tips decisively in favor of accepting mistakes that over connect the dots against those that under connect them."[762]
>
> (*Committee Study*, 129)

Time and again, the study enumerates how specific pieces of information were passed on to policy makers as results that had averted massive loss of innocent American lives:

> (~~TS//~~[redacted]~~//NF~~) The CIA briefing provided the "results" of using the CIA's enhanced interrogation techniques in briefing slides with the heading: "RESULTS: MAJOR THREAT INFO." The slides represented that KSM provided information on "[a]ttack plans against US Capitol, other US landmarks"; "[a]ttacks against Chicago, New York, Los Angeles; against towers, subways, trains, reservoirs, Hebrew centers, Nuclear power plants"; and the "Heathrow and Canary Wharf Plot." The slides also represented that KSM identified Iyman Faris, the "Majid Khan family," and Sayf al-Rahman Paracha.[1103] These representations were largely inaccurate.[1104]
>
> (*Committee Study*, 187)

While "largely inaccurate," the specific nature of the dark side and the quantifying axiomatic of information made it so that the system could produce endless amounts of false positives with impunity; after all, the Capitol still stood, no nuclear power plants had been blown up, and as long as no massive terror attacks did take place, it seemed reasonable to believe that these non-events were the positive outcome of the torture regime. But not only did the CIA lie about their results. When they encountered political opposition to the use of torture, they went so far as to falsify Congressional support for the program, claiming that a vote for the Military Commissions Act "reflected an endorsement" of torture, even though some of those who voted for the act (including John McCain) were outspoken opponents of the torture regime.

To what extend key players within the CIA believed themselves that these "inaccuracies," which in essence were lies, were actually truthful accounts of the situation is impossible to ascertain. We do know, however, that when in 2005 Senator Carl Levin called for an independent investigation of the torture regime, the CIA responded by immediately destroying all the videotapes they had from enhanced interrogations, thereby making it impossible to investigate the torture in any other ways than through the statements of CIA agents themselves.

Yet, by far the weirdest part of the whole catalog of CIA "inaccuracies" is that covering the attempts to make it sound as if the detainees were in fact asking to be tortured themselves. Both Khalid Sheikh Mohammed and Abu Zubaydah are thus at several occasions presented as men who challenge their interrogators to torture them:

(~~TS//~~[redacted]~~//NF~~) The CIA has consistently represented that Abu Zubaydah stated that the CIA's enhanced interrogation techniques were necessary to gain his cooperation. For example, the CIA informed the OLC that:

> "As Zubaydah himself explained with respect to enhanced techniques, 'brothers who are captured and interrogated are permitted by Allah to provide information when they believe they have 'reached the limit of their ability to withhold it' in the face of psychological and physical hardships.'"[228]

We have met Zubaydah and seen the wounds he sustained during his arrest, we know that he cooperated willingly with Ali Soufan before SWIGERT took over, we know what the torture did to him, and we know that he was not even a member of al-Qaeda; and we are certain that no one, least of all him, would tell his torturers that he would only cooperate if they would be so kind as to torture him.

We have listed all of these examples of strange blurrings of reality and illusion in order to ask a decisive questions: why did the CIA, the administration, and the soldiers move on with the torture regime when they not only, to begin with, had to cross certain long-held ethical and legal boundaries to set it up, but even had to lie in order to keep it running? The answer—or one answer—could be that the more dark the dark side became, the more imperative became the quantifying axiomatic and the procurement of information. Techno-scientific torture was the approach with which to try and organize this dark side, latching onto the chaotic potentiality and transforming it into informational potentiality.

And not only that. The most important characteristic of Mackey and Provance's description is that the nightmarish elements of Iraq and Afghanistan are presented as *immanent* to these places; it is as if the airport at Kandahar and the prison at Abu Ghraib come to embody a dark side where nothing could be otherwise, even though of course everything could have been otherwise – the Americans could have not bombed the airport to smithereens and they could have chosen not to use Saddam Hussein's old torture prison to set up their own prison in. Yet for all the apparent contra-factual histories one can imagine, the world in which these men moved appeared to them as a world whose most salient, chaotic characteristics were less contingent upon specific choices and actions, and more had the air of necessity or even natural laws which could only be reacted to and not acted upon. And as it appears from the testimonies, this was a world of horror.

In her text "On the Supernatural in Poetry," nineteenth century Gothic writer Ann Radcliffe attempts at a definition of the difference between "terror" and "horror:" "Terror and horror are so far opposite, that the first expands the soul, and awakens the faculties to a high degree of life; the other contracts, freezes, and nearly annihilates them" (as quoted in Sandner, 47) Elsewhere in the text, she likens the effect of terror to that of the "sublime," a ubiquitous term in 18th century aesthetic philosophy, but popularized mostly by Immanuel Kant and his use of the term in his *Critique of the Power of Judgment* from 1790, thirty-six years before Radcliffe wrote her famous essay. According to Kant, the sublime is what we feel when presented with awesome nature, a meeting that makes us:

> [R]ecognize our physical powerlessness, but at the same time it reveals a capacity for judging ourselves as independent of nature and a superiority over nature…whereby the humanity in our person remains undemeaned even though the human being must submit to that dominion (Kant, 145).

Terror, then, is that which empowers us because it forces us back into our faculties—of reason, of

judgment, of language etc.— while horror is precisely that which absorbs us to such a degree that it almost "annihilates" us. It is therefore not only in their references to a specific genre of fiction that Mackey and Provance's statements evoke horror, it is also, and perhaps mostly so, in the way that the world of the dark side appears to them and their fellow soldiers as something "objective" which cannot be otherwise, and something which absorbs them.

Between the nightmarish experiences of the soldiers and the CIA's bizarre wish to extent an obviously non-functioning torture program, the notion of being absorbed to the point of "annihilation" in the dark side seems to be a common denominator. The pun almost seems too obvious, but it would not be inaccurate to say that the War On Terror ended up also being a War Of Horror, in the specific sense of being completely absorbed in a strange, nightmarish world implied by Radcliffe's use of the term. A world which appears able to absorb one beyond one's control is what Gilles Deleuze and Felix Guattari call a "perverted, bewitched world," where "desiring-machines seem to emanate . . . in the apparent objective movement that establishes a relationship between the machines and the body without organs" (Deleuze and Guattari, 11). But as opposed to Ann Radcliffe for whom this absorption "freezes" the subject, Deleuze and Guattari demonstrate how the quantifying axiomatic becomes a way to appropriate these emanations and let them become a source of production and activity instead of a source of petrification.

Yet, for that the operation of the quantifying axiomatic does not represent a "sublime" return to our faculties or to our "superiority over nature," quite the opposite in fact. The quantifying axiomatic becomes just one more way, an even more profound way, to absorb those who work the dark side because it retains an air of affirmation: we will one day exorcize these ghostly emanations completely if only we crank the notch on the torture a bit more and do so towards an increasing amount of detainees. From having been a "perverted, bewitched" world, this very same world now becomes an "enchanted recording or inscribing surface" (ibid.) from which emanates what appears as an affirmative imperative to quantify, to axiomatize by getting information. We are far removed from any simple Enlightenment dichotomy between the dignity of human reason and the brutal reality of the natural world, and we are even farther removed from the ticking time bomb-scenario's dream of isolating the threat and the torture to one specific and highly delimited case. Instead the soldiers and their leaders were putting all their reason and energy into acting in and proliferating a system which to them appeared viscerally real, but to a slightly detached observer appears insane.

In chapter two, we saw how Dick Cheney became paranoid because of the incessant flows of unprocessed information. We might even say that his experience was a sort of desk-version of the

experiences of those, like Mackey and Provance, who would venture physically into the dark side as soldiers. However, later, when the torture program got underway, things changed, and a former top administration described the key players as "living in a fantasyland" (Mayer, 177). Through the operation of the quantifying axiomatic the "perverted and bewitched world" of the dark side had become the "enchanted . . . surface" of the quantifying axiomatic; the paranoid world of raw intelligence become the "fantasyland" of the "intelligence cycle with robust, timely, GWOT oriented, collection management planning and execution," as we have heard General Miller call it. A movement from bewitched to enchanted: the U.S torture regime and the full meaning of "working the dark side" in so many words.[159]

Full Circle

We now see that the dark side which first, in the words of Paolo Virno, was a an apocalyptic "shapeless potentiality" of "rules without regularity" became an "enchanted recording or inscribing surface" which the quantifying axiomatic of information not so much appeared forced upon as produced by; the enchanted surface took on the guise of a fact of nature or even a *law* of nature, something which could not be imagined otherwise but only be discovered. To repeat ourselves from chapter five, we can say that the fact that the dark side and the quantifying axiomatic which transformed it from being a bewitched and haunted place to a productive and promising "fantasyland" were outcomes of a specific set of operations was forgotten; the notion that the dark side was a purely quantitative space started to ooze from the nature of the dark side itself. Torturers and their victims became irreversibly hidden behind the titles of technician of information and informational resource, and the body without organs took on the the appearance of something which "arrogate[ted] to itself all the productive forces" (Deleuze and Guattari, 11).

This movement and the conceptual framework into which we have placed it explains several things; first, it explains how the endless streams of "raw intelligence" turned into the idea of the dark side which, in turn, immediately turned into the perceived need to torture. It explains why the legal

159. This movement went all the way to the top. As Jane Mayer's writes: "Some might impute dishonest motives to them. But it seems more likely that they fooled not just the public, but also themselves. In the same way that Cheney continued to insist, despite all evidence to the contrary, Al Qaeda and Saddam Hussein had collaborated on weapons of mass destruction, top Bush administration officials accepted only the facts that supported their misconceptions. In their use of coercion, they even had a means of manufacturing more such self-justifying evidence " (Mayer, 177)

memos looked the way they did, and why they chose the way of non-application over suspension of laws concerning torture and protection of prisoners of war. It explains the dominating role allotted to techno-scientific terms and technicians. And it explains the seemingly spellbound enchantment with which various officials pushed for the torture regime to move on even when it was blatantly obvious that it did not work and often even had detrimental effects on the anti-terror work.

Again, it is imperative to keep in mind that this sequence of events were not orchestrated conceptually as a sort of conspiracy based around the philosophy of Paulo Virno, Michel Foucault, and Gilles Deleuze and Felix Guattari, but that certain key choices in the Bush administration's policies ended up producing a situation which can be *understood retrospectively* through the concepts introduced by these thinkers.

EPILOGUE:

WORLDMAKING

The last chapter of this dissertation began with the metaphor of a ghost passing us on its way towards the future – a ghost of a world defined by a quantifying axiomatic of information that does its work through techno-scientific torture. The operation of this ghost is, according to Gilles Deleuze and Felix Guattari, linked to a "capitalist social formation" which deterritorializes and axiomatizes ever growing parts of society, the same way that we have seen the U.S. torture regime spread from prison to prison.

Deleuze and Guattari's version of capitalism is not the only version we have touched upon in this dissertation. In chapter three we used Michel Foucault's notion of liberalism as both a system of governmentality and economy to outline the distinctly liberal contours of the ticking time bomb-scenario; according to Foucault, the economic liberalism born in the eighteenth centry represented an intrusion of a new "site of veridiction" of the market into the world of men, a site of veridiction which would change the topology of power and knowledge dramatically once installed.

What Deleuze/Guattari and Foucault's versions of liberalism have in common, then, is a notion of a world redefined and perhaps even threatened by an intrusion of something, something beyond the codes of state or of laws, something from the outside. Yet, the intrusion or the deterritorialization appears to always penetrate into a state of things which is *already there*. It is an *in*trusion of something into what was previously a stable state of affairs or a *de*territorialization of a formerly territorialized society, and as such both versions of capitalism entail a meeting or perhaps even a standoff between two elements of a basic binary: the market and the state in Foucault's vocabulary or the old codes and deterritorialization and the quantifying axiomatic in the vocabulary of Deleuze and Guattari.

However, in the lectures the above points stem from, Foucault's sketch of "classic" liberalism is never the main point, but only a part of a greater argument concerning the development of what he sometimes calls *ordoliberalism* and other times *neoliberalism* in the latter part of the twentieth century. Significantly, ordo/neoliberalism, so Foucault's argument goes, differs markedly from earlier versions

of liberalism because it redefines or destroys the basic binary between state and market. As Foucault writes:

> In other words, instead of accepting a free market defined by the state and kept as it were under state supervision—which was, in a way, the initial formula of liberalism: let us establish a space of economic freedom and let us circumscribe it by a state that will supervise it—the ordoliberals say we should completely turn the formula around and adopt the free market as organizing and regulating principle of the state, from the start of its existence up to the last form of its interventions. In other words: a state under the supervision of the market rather than a market supervised by the state (Foucault 2008, 116).

In this quote, we can recognize the version of liberalism which we used as our analytical framework in chapter three, namely the version in which the market is indeed a "site of veridiction," but also a site which ultimately remains under state control, even if the relation between market and state most often will be filled with contradictions and conflicts. Yet, with the advent of "ordo-" or "neoliberalism" something new happens; the state is no longer an entity which is intruded upon by the market, but something built upon the market and therefore completely congenial with the market. The old conflict between state and market is gone, since the principles that govern the market are now essentially the very same principles governing the state, and with this the very idea of the state changes radically.

But as Foucault also documents, the state is not the only entity that undergoes a change with the advent of neoliberalism. The market itself—which used to be the epitomy of the "natural" and "spontaneous"—is also reconceptualized according to a completely different logic than that found in classic liberalism:

> [C]ompetition as an essential economic logic will only appear and produce its effects under certain conditions which have to be carefully and artificially constructed. This means that pure competition is not a primitive given. It can only be the result of lengthy efforts and, in truth, pure competition is never attained. Pure competition must and can only be an objective, an objective thus presupposing an indefinitely active policy (ibid., 120).

So, on the one hand, we have in neoliberalism a state which must be constructed purely on the principles of the market, and on the other, a market whose governing principles are no longer

ontologically more real, spontaneous, or natural than that of the state, but precisely as artificial. That a well-functioning market no longer is considered to be something springing spontaneously from nature or man means that the market ultimately has to be *produced* by the very state which, in turn, is to be built on the principles of the market.

This leads to one of the most commonly recognized paradoxes of neoliberalism, namely that it, as opposed to classical liberalism, does not oppose a strong state, but in fact requires a strongly intervening state for its philosophy to function. As historian and philosopher of economic thought Philip Mirowski writes in *Never Let a Serious Crisis Go Waste*, "neoliberalism is not at all enamored of the minimalist night-watchman state of the classical liberal tradition: its major distinguishing characteristic is instead a set of proposals and programs to infuse, take over, and transform the strong state, in order to impose the ideal form of society" (Mirowski, 40). Neoliberalism, then, appears as a paradoxical philosophy because it *is* a paradoxical philosophy which leads to equally paradoxical results. Sociologist Wolfgang Streeck thus notes about the bail-outs of the banks after the financial meltdown of 2008:

> In the measures taken by governments and central banks to save the private banking system, the distinction between public and private money has become increasingly irrelevant, and finally, with the takeover of bad loans, it became clear how seamlessly the one passed into the other. Today it is virtually impossible to tell where the state ends and the market begins, and whether governments have been nationalizing banks, or bank have been privatizing the state (Streeck, 40).

Nationalization of the private sector or privatization of the state; in the neoliberal matrix the one is impossible to tell from the other since, due to the shared principles between the two, there is no essential difference between the private and the public anymore.

These considerations on the transition from liberalism to neoliberalism—which according to most analyses picked up speed with the Thatcher and Reagan administrations and since spread to be the dominant form of governance in the global North—might seem like a detour into something which is at best tangential to this dissertation's focus on the U.S. torture regime. Yet, two things indicate that it may not be as much of an excursus as we might think: first, the lectures in which Foucault develops his notion of neoliberalism are called *The Birth of Biopolitics*, with "biopolitics" being a term which, to Foucault, has a strong affinity to (national) security; and, second, the link we, with Deleuze and

Guattari, have established between the U.S. torture regime and the operations of the "capitalist social formation" might find new perspectives with this new notion of what a capitalist social formation actually is or can be.

Biopolitics (and the corresponding term "biopower") is a notoriously fickle term in Foucault's oeuvre. The concept was introduced in the last session of a series of lectures given two years before *The Birth of Biopolitics* under the title *Society Must Be Defended*, where Foucault described how a change in the objectives and prerogatives of sovereign power took place in the nineteenth century. From the sovereign's powers having been those of "tak[ing] life and let[ting] die," the new sovereign power, the new *biopolitical* power, was instead concerned with "'mak[ing]' live and 'let[ing]' die" (Foucault 2003, 241). In other words, the role and the job of (bio)power—a role which was inextricably connected to developments within statistics, biology, epidemology etc.—was to produce as much life and as many lives as possible:

> Unlike discipline, which is addressed to bodies, the new nondisciplinary power is applied not to man-as-body but to the living man, to man-as-having-being; ultimately, if you like, to man-as-species. To be more specific, I would say that discipline tries to rule a multiplicity of men to the extent that their multiplicity can and must be dissolved into individual bodies that can be kept under surveillance, trained, used, and, if need be, punished. And that the new technology that is being established is addressed to a multiplicity of men, not to the extent that they are nothing more than their individual bodies, but to the extent that they form, on the contrary, a global mass that is affected by overall processes characteristic of birth, death, production, illness, and so on (ibid., 242-43).

Biopolitics, then, is the techno-scientific administration and proliferation of man as *species*. It is a way to move from the disciplining of people as individuals to the statistical administration of people as numbers or of people as a "global mass." German Sociologist Thomas Lemke calls the logic of biopolitics "a relative logic of calculating, measuring, comparing" (Lemke, 39), and with this added description the contours of something which bears more than a few commonalites with the U.S. torture regime and its quantifying axiomatic start to become clear; a logic where individuals are replaced with (detainee) populations; a world governed by *relative* measures of purely quantitative, numerical information; and a world where the disciplining of individuals—in prisons, schools, hospitals etc.—

with the intention of releasing them out into society again is completely abandoned. For all intents and purposes, Lemke and Foucault could almost be describing the U.S. torture regime.

The Control Society

In what appears to be an explicit dialogue with Foucault's notion of the biopolitical, the aging Gilles Deleuze wrote an article in 1990 entitled "Postscript on the Societies of Control." In this article we can recognize certain things from *Anti-Oedipus*, but it is also apparent that Deleuze considers the "control society" he describes to be something new:

> The numerical language of control is made of codes that mark access to information, or reject it . . . Individuals have become *"dividuals,"* and masses, samples, data, markets, or *"banks."* Perhaps it is money that expresses the distinction between the two societies best, since discipline always referred back to minted money that locks gold in as numerical standard, while control relates to floating rates of exchange, modulated according to a rate established by a set of standard currencies. The old monetary mole is the animal of the spaces of enclosure, but the serpent is that of the societies of control. We have passed from one animal to the other, from the mole to the serpent, in the system under which we live, but also in our manner of living and in our relations with others. The disciplinary man was a discontinuous producer of energy, but the man of control is undulatory, in orbit, in a continuous network. Everywhere *surfing* has already replaced the older *sports* (Deleuze, 6, emphasis in original).

In the "old" system, then, the system of the "disciplinary man," everything was about the individual and the individual as a "discontinuous producer of energy." The individual would pass from one "enclosure" to the next (ibid., 3) and perform certain discreet tasks or chores at each location—produce at the factory, be educated at school, be cured in the hospital, be disciplined in the prison—and each location would thus come to represent a threshold for the individual as he or she passed through life and learned how to be a productive, docile citizen.

In the new system, in the society of control, there are no enclosures and no thresholds because there are no individuals to enclose or to cross from one stage to the next, only "dividuals" who exist as "masses, samples, data, markets, or *'banks"*" in a perpetual modulation of the same quantitative regime.

"In the societies of control one is never finished with anything," as Deleuze writes (ibid., 5), indicating precisely that the days of the prison, the school, or the military are over since all of these represent not only loci but also thresholds; you leave school, the prison, or the military one day, but you never leave the society of control.

To further describe the operations of the control society, Deleuze once again turns to the economic sphere and points to the abandonment of the gold standard as marking a transition from the disciplinary society to the society of control. While, at least in principle, the system of the gold standard had made "minted money" into something with a conversion rate into something tangible, namely gold, the final abandonment of the gold standard in the seventies meant that money lost its final anchor in reality and became pure floats and modulations. As in Foucault's lectures on *The Birth of Biopolitics* which essentially ended up being about the birth of *neoliberalism* instead, Deleuze's text thus perceives the organization of the economy, the society, and (in)dividuals as pertaining to the same "language of control" which is no longer constructed around certain places or thresholds, but on incessant modulation of numbers, codes, and samples which bear no relation to anything but themselves. Everything in the control society becomes a techno-scientific procedure of modulaton and comparing of numbers and samples; there are no stable entities left for the market to deterritorialize or intrude upon since stability has become a purely numerical phenomenon.

In his 1954 book *The Technological Society*, French philosopher Jacques Ellul had already theorized about the complete technologization of the world, claiming that "the technical phenomenon is the main preoccupation of our time" (Ellul, 21). This general "technical phenomenon" was perceived by Ellul to consist of three subcategories: "economic technique," the "technique of organization," and "human techniqe" (ibid., 22), three categories which we also identified in Deleuze's description of the control society. Further elaborating on the effects of this technologization, Ellul notes that:

> [W]hen technique enters into every area of life, including the human, it ceases to be external to man and becomes his very substance. It is no longer face to face with man but is integrated with him, and it progressively absorbs him. In this respect, technique is radically different from the machine. This transformation, so obvious in modem society, is the result of the fact that technique has become autonomous (ibid., 22).

Again, this description seems readily transferable to many aspects of the U.S. torture regime – not only to the detainees and their predicaments, but also the guards, the soldiers, the torturers etc. who all

become progressively "absorbed" in the techno-scientific quantifying axiomatic of ever growing amounts of information. From Foucault over Ellul to Deleuze, we therefore see our late modern predicament can be described as permeated by a specific logic of statistics, of technology and science, and of relative, abstract numbers, a logic which no longer is a tool for the state or a region governed by the state, but which defines the operations of the state as such. When Bruno Latour in his *We Have Never Been Modern* (1991) claims that "Yes, science is indeed politics pursued by other means" (Latour, 111), this may not apply to the neoliberal, biopolitical society of control where the causality instead seems to work the other way: here, politics is indeed science pursued by other means – everything, in fact, is science pursued by other means, a science understood as abstract quantification as the governing principle of all aspects of human organization.

The U.S. Torture Regime

I started this dissertation by claiming that I would follow the making of a world – the bipolar world of the light and the dark side—through readings of documents from the War On Terror. As we have seen, this world had a specific set of characteristics that were produced by a specific set of legal-political operations; these characteristics, in turn, led to the techno-scientific operation of the quantifying axiomatic as a way to organize the new and frightful world. And the main techno-scientific operation was that of torture. By employing the conceptual framework of Gilles Deleuze and Felix Guattari from *Anti-Oedipus* I pointed to the similarities between the logic of the U.S. torture regime and a "capitalist social formation" as this concept was understood by the two French philosophers.

Perhaps, however, we should go one step further and say that the U.S. torture regime was not a preeminently "capitalist" national security apparatus, but that it instead marked a threshold or a transition from a world where the basic binary between the logic of the state and the logic of the market grinded against each other in constant tension to a biopolitical and neoliberal society of control where all tensions are dissolved into numbers and information. For reasons of space I have sadly not been able to go into the effects on the U.S. Army and intelligence community of neoliberal reforms, but as Peter Singer has demonstrated in *Corporate Warriors*, the U.S. public sector in general and the U.S. Army specifically underwent severe budget slashes in the nineties as part of a "cumulative externalization of state functions across the globe" (Singer, 66) slashes which meant that the U.S. Army in reality could not engage in any military operations without support from private contractors – and without paying outrageous sums for this support. While earlier it would have been unthinkable to privatize the

military—which precisely was the emblematic public institution seeing as it represented the state *in toto* and the state's interests—when neoliberal reforms got underway in the nineties, "it was less of a stretch for [leaders] to consider doing so [privatizing] in the military domain" (ibid., 66).

This privatization movement would turn out to be a winning lottery ticket for the two main architects behind the U.S. torture regime—SWIGERT, aka James Mitchell, and DUNBAR, aka Bruce Jessen—whose company's contract with the U.S. government to set up the torture regime was "in excess of $180 millon" (*Commitee Report*, 168). As it turns out, torture was not only a brutal business but also a highly lucrative business.

Many commentators have described the U.S. torture and detainee regime as "Kafkaesque," a term often used to describe an absurd system of endless bureaucracy in which the individual has lost all power over his or her fate. Yet, in the end of his article on the control society, Deleuze gives us a more specific definition of the Kafkaesque:

> In *The Trial*, Kafka, who had already placed himself at the pivotal point between two types of social formation, described the most fearsome of juridical forms. The *apparent acquittal* of the disciplinary societies (between two incarcerations); and the *limitless postponements* of the societies of control (in continuous variation) are two very different modes of juridical life, and if our law is hesitant, itself in crisis, it's because we are leaving one in order to enter into the other (Deleuze 5, emphasis in original).

We can certainly recognize the fate of many of the detainees that are still held by United States in this quote, detainees who—as we saw with Abu Zubaydah—turned out to be close to innocent, but who are in Guantanamo, living a life of "limitless postponement." But Deleuze's version of the "Kafkaesque," is also interesting because it appears to be a *borderline* concept; the Kafkaesque is a gap or a lacuna between two systems of government, of national security, and of economy, a sort of pause after the old forms have been abandoned, but before the new forms have been implemented entirely.

In this lacunae or gap remnants of the old system still exist, the most salient being the fact that the detainees are in fact held in prisons and that some of them have after all been told that they have been wrongfully detained and tortured; these remnants exist side by side with elements of the new system, elements which include the complete disregard for the individual as a subject of discipline and a bearer of guilt, and an exclusive focus on information. Combined, these remnants of the old system

and the already implemented elements of the new system make up the absurdities of the U.S. torture and detainee regime.

What would a complete implementation of the new biopolitical and neoliberal control society look like in its national security iteration? We do not have to speculate or theorize on this, but only look out the window – or, rather, up into the sky and imagine the discreet hum of drones and the momentary reflection of sunlight in their metallic outside, an experience which may still be on the level of imagination for citizens in the West, but which is a daily reality for many of those who we do not count as allies. When the Obama administration took over the White House in 2009, the president publicly bemoaned the "dark and painful chapter" that had been the U.S. torture regime. Yet, he did not abandon this regime so much as he replaced it with a new one; a new global regime of "kill rather than capture" (as quoted in Chamayou, 14), where drones eliminate threats based not on the documented or even suspected guilt of individuals, but on statistical algorithms that, based on a vast range of parameters, calculate whether the person on the ground may one day become a terrorist or an armed opponent of the United States. This regime, I think, is the new system in its purest form, liberated from all remnants of the old systems of prisons, of discipline, and even of torture. Information is no longer something that is extracted, so much as it is something that is calculated, and here the mistaken torture of Abu Zubaydah and hundreds of others would never have occurred since there is no possibility of error in such a system. Based on the assumptions as to Zubaydah's connections with Al Qaeda, he would have been dead long before his innocence was ascertained – a number in a statistic representing the assassination of yet another person whose future has been calculated beforehand by a pure informational paradigm, and a person whose future is deemed too dangerous to ever allow it to materialize.

The deeper connections and disconnections between the U.S. torture regime and the U.S. drone regime still remain to be investigated. I am, however, certain that such an investigation would have to take as its starting point the fact that the U.S. torture regime was not an atavistic rebound to or the last brutality of the age of torture; it was the first brutality in the age of the neoliberal and biopolitical society of control.

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ABSTRACT

A few days after the terror attacks of 9/11, then Vice President Dick Cheney appeared on television with a call for "working the dark side." While still unclear what this expression entailed at the time, Cheney's comment appears in retrospect to almost have been prophetic for the years to come – years where parts of the U.S. Army and intelligence community set up a rampant torture regime all across the world. Yet, the connection between a so-called "dark side," "working" this "dark side," and the torture that followed is not a given, but, instead, a consequence of a set of very specific legal, political, and personal choices in the early years after 9/11. This dissertation is an investigation into how the notion of a "dark side" took form, and of how and why the specific make-up of this"dark side" ended up creating a torture regime which already today seems almost unreal. The dissertation's first half—*dark side*—documents the making and nature of the dark side by analyzing a series of legal memos from the Department of Justice's Office of Legal Council and from the White House and concludes by relating its findings to traditional ideas about emergency action, national security, and torture. By analyzing official reports and testimonies from soldiers partaking in the War On Terror, the dissertation's second part—*dark arts*—focuses on the transformation of the dark side into a productive space in which "information" and the hunt for said information overshadowed all legal, ethical, or political boundaries and came to define what it meant to "work" the "dark side."

RESUMÉ

Få dage efter terrorangrebene den 11. september 2001 sagde daværende vicepræsident Dick Cheney I et tv-interview, at det ville blive nødvendigt at "arbejde på den mørke side." Selvom det på det tidspunkt stadig var uklart, hvad Cheney's udtryk præcis betød, forekommer det I retrospekt nærmest at have været profetisk for de følgende år – år, hvor dele af den amerikanske hær og efterretningsvæsen etablerede et brutalt, globalt torturregime. Forbindelse mellem den "mørke side," at "arbejde" på den "mørke side," og den tortur der hurtigt fulgte var dog ikke givet på forhånd, men en konsekvens af en specifik serie af juridiske, politiske og personlige valg I de tidlige år efter d. 11. september. Denne afhandling undersøger hvordan idéen om en mørk side tog form, og hvordan og hvorfor den mørke sides specifikke karakter endte med at skabe et torturregime, der allerede I dag virker næsten uvirkeligt. Afhandlingens første halvdel—*dark side*—dokumenterer skabelsen af den mørke side og optegner den mørke sides karakter ved at analysere en række såkaldte "legal memos" fra det amerikanske justitsministerium og det Hvide Hus. Første halvdel afslutter med en perspektivering til mere traditionalle idéer om undtagelsestilstande, national sikkerhed og tortur. Gennem analyser af officielle rapporter og vidnesbyrd fra soldater, der deltog I Krigen mod Terror, fokuserer afhandlingens anden del—*dark arts*—på forvandlingen af den mørke side til et produktivt rum, hvor "information" og jagten på "information" overskyggede alle legale, etiske og politiske grænser og endte med at definere, hvad det betød at "arbejde på den mørke side."